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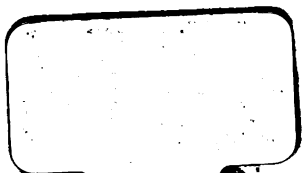
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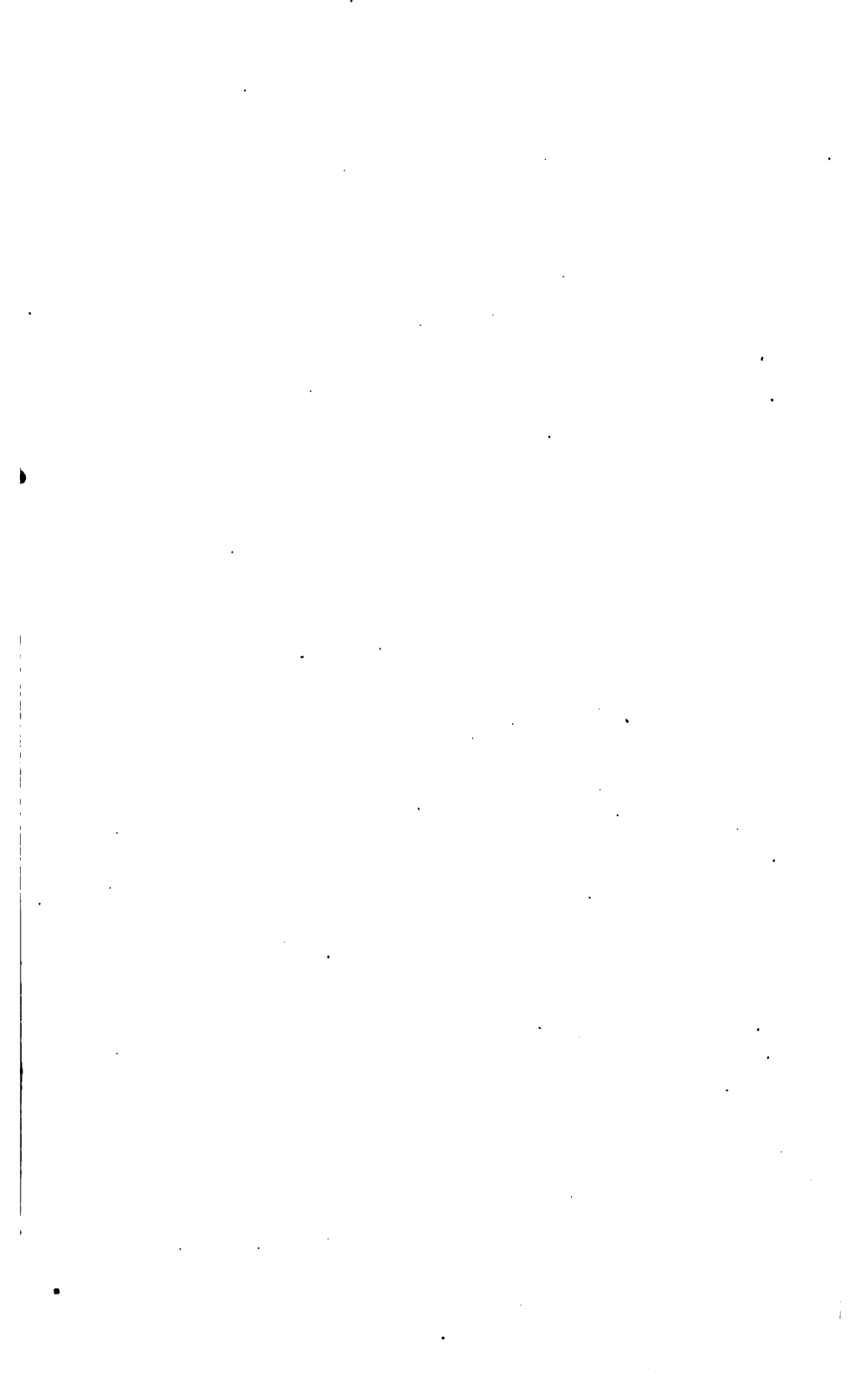
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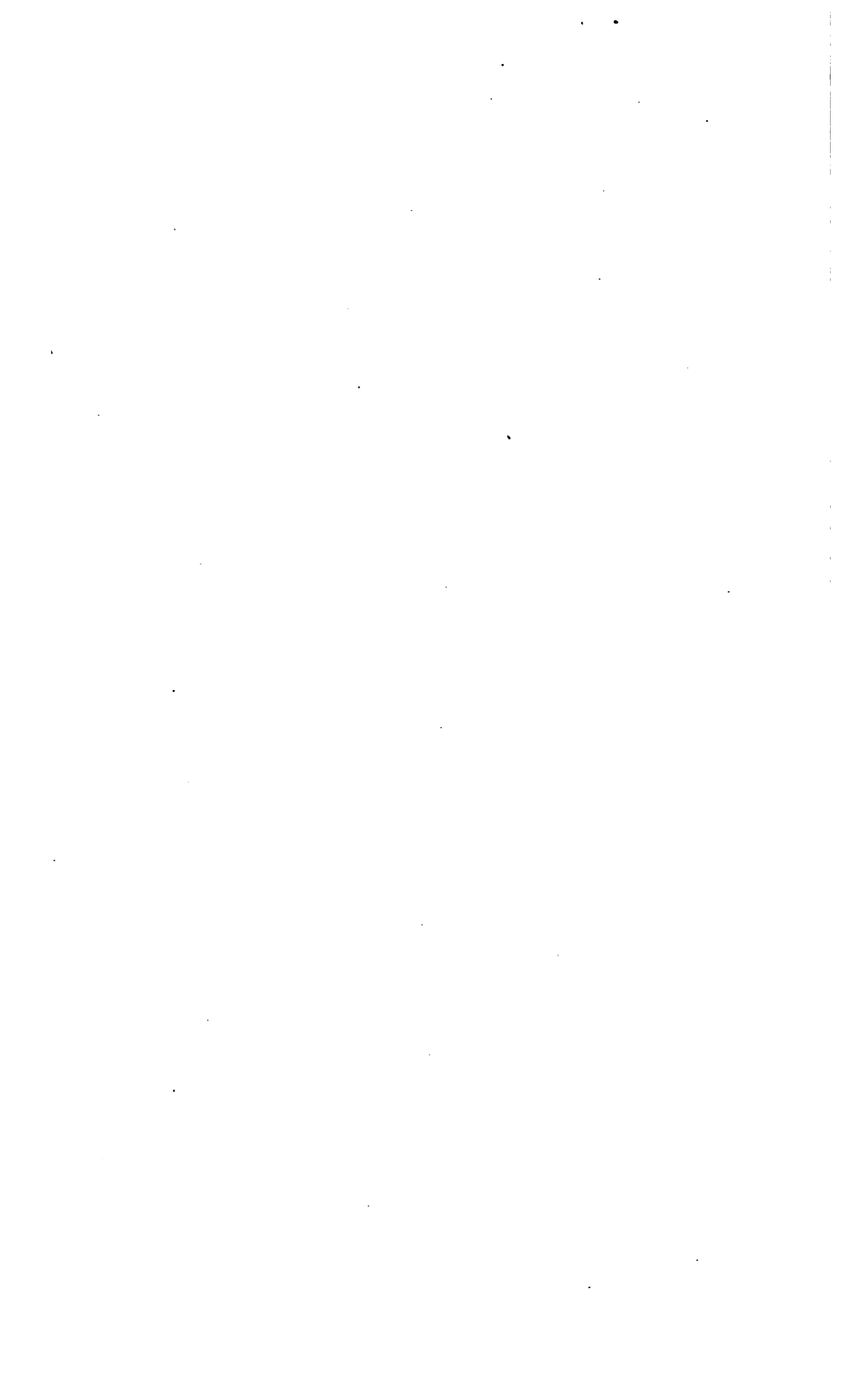
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA,

DURING THE YEAR 1873-4.

REPORTED BY

ALFRED HELM, CLERK OF SUPREME COURT,

AND

THEODORE H. HITTELL, Esq.

Volume IX.

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1874.



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“ C. H. BELKNAP, }ASSOCIATE JUSTICES.

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Seventh District.....	HON. MORTIMER FULLER.
Eighth District.....	HON. W. H. BEATTY.
Ninth District.....	HON. J. F. FLACK.

TABLE OF CASES.

	PAGE
Bercich v. Marye.....	312
Bidwell ads. Schaefer.....	209
Birchfield v. Harris.....	382
Birchim ads. State.....	95
Blanchard, Ex Parte.....	101.
Blasdel v. Williams.....	161
Buckley v. Buckley.....	373
Bullion M. Co. ads. 420 M. Co.....	240
Carlow ads. Kraft.....	20
Central Pacific R. R. Co. ads. State.....	79
Clute ads. Skinker.....	342
Cohn ads. State.....	179
Commissioners of Eureka Co. ads. Morgan.....	360
Commissioners of Washoe Co. v. Hatch.....	357
Connery v. Swift.....	39
Cook ads. Davis.....	134
Cookes v. Culbertson...	199
Corey, State ex rel. v. Curtis	325
County of Eureka Commissioners ads. Morgan.....	360
County of Washoe Commissioners v. Hatch.....	657
Culbertson ads. Cookes.....	199
Curtis ads. State ex rel. Corey.....	325
Dalton ads. Lamburth	64
Dalton ads. Libby.....	23

Dalton v. Libby and Lamburth.....	192
Davis v. Cook.....	134
Dean v. Pritchard.....	232
Eureka Co. Commissioners ads. Morgan.....	360
Eureka M. & S. Co. v. Way.....	349
Ex Parte Blanchard.....	101
Ex Parte Roberts.....	44
Ex Parte Winston.....	71
Ferguson ads. State.....	106
Floral Mill and M. Co. ads. Wheeler.....	254
420 M. Co. v. Bullion M. Co.....	240
Guardianship of Mary Winkleman.....	303
Hall ads. State.....	58
Hall ads. Youngs.....	212
Harding, State ex rel. v. Moor.....	355
Harrington ads. State.....	91
Harris ads. Birchfield.....	382
Hassett v. Walls.....	387
Hatch ads. Commissioners of Washoe Co.....	357
Johnson ads. State.....	175
Kane ads. Newman.....	234
Keith ads. State.....	15
Kennedy ads. Menzies.....	152
Kraft v. Carlow.....	20
Lambert ads. State.....	321
Lamburth v. Dalton.....	64
Lamburth and Libby ads. Dalton.....	192
Lemon Mill and M. Co. ads. Street.....	251
Libby v. Dalton.....	23
Libby and Lamburth ads. Dalton.....	192

Little v. Virginia and G. H. W. Co.....	317
Longabaugh v. Virginia and T. R. R. Co.....	271
Magnet M. Co. v. Page and Panaca S. M. Co.....	346
Martin ads. Marye.....	28
Marye ads. Bercich.....	312
Marye v. Martin.....	28
Matter of Mary Winkleman.....	303
Menzies v. Kennedy.....	152
Morgan v. Commissioners of Eureka Co.....	360
Moor ads. State ex rel. Harding.....	355
Murphy ads. State.....	394
Neil v. Wynecoop.....	46
Newman v. Kane.....	234
Newman ads. State.....	48
Page and Panaca S. M. Co. v. Magnet M. Co.....	346
Pritchard ads. Dean.....	232
Quill ads. Warren.....	259
Roberts, Ex parte.....	44
Rosemurgey ads. State.....	308
Roy v. Whitford.....	370
Schaefer v. Bidwell.....	209
Shaw ads. Sherman.....	148
Sherman v. Shaw.....	148
Silver ads. State.....	227
Skinker v. Clute.....	342
State ex rel. Corey v. Curtis.....	325
State ex rel. Harding v. Moor.....	355
State v. Birchim.....	95
State v. Central Pacific R. R. Co.....	79
State v. Cohn.....	179
State v. Ferguson.....	106

State v. Hall.....	58
State v. Harrington.....	91
State v. Johnson.....	175
State v. Keith.....	15
State v. Lambert.....	321
State v. Murphy.....	394
State v. Newman.....	48
State v. Rosemurgey.....	308
State v. Silver.....	227
State v. Stewart.....	120
State v. Summers, No. 1.....	269
State v. Summers, No. 2.....	399
Stewart ads. State.....	120
Street v. Lemon Mill and M. Co.....	251
Summers ads. State, No. 1.....	269
Summers ads. State, No. 2.....	399
Swift ads. Connery.....	39
Treadway v. Wilder.....	67
Virginia and G. H. W. Co. ads. Little.....	317
Virginia and T. R. R. Co. ads. Longabaugh.....	271
Walls ads. Hassett.....	387
Warren v. Quill.....	259
Washoe Co. Commissioners v. Hatch.....	357
Way ads. Eureka M. & S. Co.....	349
Wheeler v. Floral Mill and M. Co.....	254
Whitford ads. Roy.....	370
Wilder ads. Treadway.....	67
Williams ads. Blasdel.....	161
Winkleman, Guardianship of Mary.....	303
Winston, Ex parte.....	71
Wynecoop ads. Neil.....	46
Youngs v. Hall.....	212

RULES
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

RULE I.

Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) twenty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

RULE IV.

On such motion, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this court shall be on paper of uniform size, according to a sample to be furnished by the clerk of the court, with a blank margin one and half inches wide at the top, bottom, and side of each page; and the pleadings, proceedings, and statement shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and shall have, at least, one blank or fly-sheet cover.

Marginal notes of each separate paper, order, or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured, and every part conveniently read.

The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

RULE VI.

No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the court before the argument on its merits.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE X.

The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE XI.

Causes from the same judicial district shall be placed together, and all the causes shall be set on the calendar in the order of the several districts, commencing with the first, except that causes in which the people of the State are a party shall be placed at the head of the calendar.

RULE XII.

At least three days before the argument, the appellant shall furnish to the respondent a copy of his points and citation of authorities; and within two days thereafter, the respondent shall furnish to the appellant a copy of his points and citation of authorities, and each shall file with the clerk a copy of his own for each of the justices of the court, or may, one day before the argument, file the same with the clerk, who shall make such copies, and may tax his fees for the same in his bill of costs.

RULE XIII.

No more than two counsel on a side will be heard upon the argument, except by special permission of the court; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument.

RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, presented within ten days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein provided, and decision upon the petition, except on special order.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur to the court below.

RULE XVII.

No paper shall be taken from the court-room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court

below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *superseas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree, which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each forty miles, or fraction of forty miles, from Carson.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JULY TERM, 1873.

THE STATE OF NEVADA, RESPONDENT, *v.* GEORGE
KEITH, APPELLANT.

CRIMINAL APPEALS — PRESUMPTIONS IN FAVOR OF INSTRUCTIONS. On appeal in a criminal case, where the testimony is not carried up, it will be presumed that the instructions to the jury were applicable to the proofs, unless it clearly appears that no case could reasonably be imagined in which they would be correct.

PRESUMPTION FROM USE OF DEADLY WEAPON. When a person uses a deadly weapon upon the person of another in a manner likely to produce death, the law presumes an intent to commit murder—as distinguished from what he may have actually accomplished—unless facts are shown sufficient to excuse, mitigate, or justify the act.

ASSAULT WITH INTENT TO COMMIT MURDER. Where on a trial for assault with intent to commit murder the court instructed the jury to convict if it found that defendant made an assault with a deadly weapon upon the person named, about the time charged, and in such manner that the offense would have been murder in the second degree had the assault resulted in death: *Held*, unobjectionable.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

State v. Keith.

The defendant was indicted for the crime of assault with intent to commit murder by shooting Edward Mitchell with a pistol in Elko County on or about December 25, 1872. He was tried and convicted as charged in the indictment, and afterwards sentenced to incarceration in the State prison for the term of one year. He appealed from the judgment and an order of the court below denying his motion for a new trial. The transcript on appeal did not contain any of the testimony.

Lucas & Bigelow, for Appellant.

I. Where the evidence is not brought up, the court must presume that the instructions given to the jury related to the case before them. *State v. Barry*, 31 Cal. 357. And if the charge is wrong under any conceivable state of evidence, the court will presume prejudice to defendant. *People v. Long*, 39 Cal. 695.

II. The first instruction was erroneous, because it asserted that if one uses a deadly weapon, in a manner likely to produce death, it raises a presumption that he is guilty of assault with intent to commit murder. The law does not presume anything of the kind; if there is any presumption, it is that he intended just what he accomplished, and nothing else. If he had killed, then the law might presume he so intended; but when he only held a pistol in his hand, in a careless manner, so as to endanger the life of others, it would be very harsh for the law to presume—first, an assault; second, an intent to do what he did not do, that is, to kill; and, third, malice aforethought; all of which ingredients are necessary to make up the crime of assault with intent to murder. The intent must be proven, either by the circumstances or otherwise. *People v. Harris*, 29 Cal. 681; *State v. McGinnis*, 6 Nev. 112.

State v. Keith.

III. The fourth and fifth instructions properly belong together and are erroneous under any conceivable state of the case. The fourth asserts that if the assault was made under such circumstances as would have been murder in the second degree if death had been the result, then defendant was guilty of assault with intent to commit murder; whilst the fifth asserts that it would be murder if one party, after a quarrel, followed the other out of a house and killed him without further provocation. One person may quarrel with another, follow him out of a house, and kill him unintentionally. It would not be murder without an intentional killing with malice aforethought, either express or implied; and as the definition of the crime of which defendant was convicted was based on a definition of murder which was erroneously given, it must be presumed that he was injured thereby.

L. A. Buckner, Attorney-General, for Respondent.

By the Court, *HAWLEY, J.*:

It is claimed by appellant that the court below erred in giving four instructions, asked by the prosecution. There is no evidence in the transcript, and it is contended by appellant that if either of the instructions are erroneous under any conceivable state of evidence, it is the duty of this Court to presume prejudice to defendant. The true rule is just the reverse. When no testimony is presented, it is always presumed by appellate courts that the instructions given in the lower court were applicable to the proofs in that particular case; and the instructions should never be declared erroneous unless it clearly appears that no case could reasonably be imagined wherein they would be correct. *State v. Forsha*, 8 Nev. 140; *State v. Pierce*, 8 Nev. 302; *People v. Long*, 39 Cal. 697.

While the phraseology of the instructions might be materially improved, we think that, taken together, they substantially state correct principles of law. The first and third are substantially alike. The third reads as follows: "Upon an indictment for an assault to commit murder, it is the intent to commit murder that constitutes the gist of the offense, and the intent to commit murder must be proven; but the law in the first instance presumes the intent to commit murder to be proven that [when] one person uses a deadly weapon upon the person of another in a manner likely to produce death, unless facts are shown on the trial of the case sufficient to excuse, mitigate, or justify the act."

It is argued by counsel for appellant that no presumptions arise from the use of a deadly weapon except that defendant intended just what he accomplished and nothing else, and that the specific intent must therefore be proved and found. We do not so understand the law. Men often fail in accomplishing their purpose, and it often becomes necessary for the jury to determine from all the circumstances of the case, as shown by the evidence, what was really intended. The law holds the defendant accountable for the natural and probable consequences of his acts, when unlawful, regardless of the question whether he accomplished his purpose or not. Lord Mansfield says that "Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." This rule is recognized as correct by all the authorities. 3 Greenleaf Ev. Secs. 13, 14, 18. Applying this rule to the case under consideration, it follows that if the defendant did assault the person named in the indictment, with a deadly weapon, in such a manner as was calculated to produce the death of the person assaulted, the law presumes that such was defendant's intention, and throws

upon him the burden of showing facts in mitigation, justification, or excuse. 1 Greenl. Ev. Secs. 14, 18; Burrill's Ev. 297; *People v. Vinegar*, 2 Parker Cr. R. 26; *Wright v. State*, 9 Yerger, 342; *People v. Bealoba*, 17 Cal. 395.

We think the fourth instruction unobjectionable. By it the jurors were instructed that if they believed from the evidence that the defendant did make an assault upon the person named in the indictment about the time charged, "and in such a manner that had the person so assaulted died from the effects of the assault, the offense would have been murder in the second degree, then they should find the defendant guilty as charged in the indictment."

The fifth is as follows: "If two parties engage in a quarrel in a house, and one party abandon the contest and pass out of the house, and the other party follow him out, and, without any further provocation, kill the first party, the party so killing is guilty of murder, although the party killed may have been the aggressor in the first instance." The correctness of this instruction would materially depend upon the particular facts of the case. We can readily imagine a case wherein the giving of this instruction would be erroneous. For instance: In a case where the evidence showed there had been a mutual quarrel between the parties, and that defendant had been first assaulted in such a manner as might, in law, be deemed a sufficient provocation to excite an irresistible passion in a reasonable being, then the question whether there had been a sufficient time between the first and second assault for the voice of reason and humanity to be heard, ought properly to be submitted to the jury, to determine whether the offense would be murder or manslaughter. There are cases, also, where it might be a disputed question whether the retreat was made in good faith in order to avoid further struggle, or simply for the purpose of obtaining an undue advantage; in all such cases, it would be necessary to submit this question to the jury.

Kraft v. Carlow.

If such were the facts of this case, appellant ought to have presented the evidence to this Court in a bill of exceptions. Not having done so, we are bound to consider that no such questions of fact existed in the case, and that no error prejudicial to defendant has occurred. *State v. Stanley*, 4 Nev. 77; *State v. Little*, 6 Nev. 283.

The judgment of the district court is affirmed.

**WILLIAM KRAFT, RESPONDENT, v. N. H. CARLOW,
APPELLANT.**

OCCASIONAL ACTS OF OWNERSHIP NOT ACTUAL, BONA FIDE POSSESSION. Where plaintiff's grantor posted notice upon a tract of sixty acres of public land, stating that he claimed it; had it surveyed the next spring; cut hay from it in the summer, and while so doing put up a brush and canvas shanty for occupation, which he afterwards tore down, removing the canvas; and then sold to plaintiff, who in the fall burned the stubble; spent six weeks on the land the next summer; cut the hay; made twenty rods of fencing on one side; built a small cabin; ran three ditches with a plow; then left, and did not return till fall, when he was there again for a few days, burning the stubble; and there was nothing to designate the boundaries of the tract: *Held*, insufficient showing to maintain ejectment.

KIND OF POSSESSION NECESSARY TO MAINTAIN EJECTMENT. Where possession is relied upon to maintain ejectment, it must be an actual, bona fide possession, a subjection to the will and dominion of the claimant, as contradistinguished from the mere assertion of title and the exercise of occasional acts of ownership.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

This was an action of ejectment to recover possession of a tract of about sixty acres of land, known as Davis's Ranch, in Meadow Valley, Lincoln County. The plaintiff relied upon prior possession. When he had introduced his testimony—the substance of which is stated in the opinion—

Kraft v. Carlow.

defendant moved for a nonsuit, on the ground that he had failed to show such an occupation or possession as would entitle him to a recovery. The motion was denied. The defendant then introduced testimony showing the peaceable character of his own entry and the good faith of his occupancy. There was a verdict for plaintiff. A motion for a new trial having been denied, defendant appealed from the judgment and order.

Henry Rives, for Appellant.

I. The evidence established the facts that neither plaintiff nor his grantor had ever complied with the possessory act of this State (Stat. 1864-5, pp. 343 and 344) in acquiring title to the premises in dispute, and that he must therefore rely for recovery upon actual possession; that plaintiff had never been in possession except upon three occasions in more than two years; that he had never enclosed the premises nor marked the boundaries; that he had not been upon the premises for two months prior to defendant's entry, and was not necessarily absent at the time of such entry; that defendant found no one in possession of the premises, and entered peaceably, without fraud, and occupied them sometime without any claim thereto on the part of plaintiff, and continued to live upon the premises, occupying and claiming them in good faith. Under this state of facts, shown by plaintiff's own testimony, the court below erred in not granting the motion for non-suit. *Sankey v. Noyes*, 1 Nev. 68; *Staininger v. Andrews*, 4 Nev. 59.

II. The evidence was insufficient to justify the verdict. The premises were shown to be agricultural and grazing land, and plaintiff was proven not to have enclosed or cultivated them, nor to have improved them, nor indicated how much he claimed, nor to have done anything concerning

Kraft v. Carlow.

them save what any person may, and frequently does, concerning public lands without acquiring or even claiming any title thereto; that is to say, selling the hay standing upon the land and, under his contract of sale, cutting the same. There was no conflict of evidence.

Bishop & Sabin, for Respondent.

By the Court, BELKNAP, J.:

In the month of September or October, 1869, the plaintiff's grantor posted a notice upon an unoccupied tract of about sixty acres of land in Lincoln County, stating that he claimed the same. The following spring he had the land surveyed, and in June or July, 1870, cut hay from it. He erected a canvas and brush shanty for occupation while engaged in hay-cutting, and thereafter tore it down and took away the canvas.

In November, 1870, the plaintiff purchased the premises and prepared the land for the coming hay season by burning the stubble thereon. This done, he left and did not return there until the latter part of June, 1871, when he remained a month or, under the most favorable construction of the testimony, six weeks. During this time he cut the hay, constructed sixteen or twenty rods of fencing upon the lower side of the tract and built a small cabin; three ditches, also, were made somewhere upon the land by means of a plow. Between the eighth and fifteenth of November he was upon the premises four or five days burning stubble; and again he was there about the first of December and remained over night. Neither the plaintiff nor his grantor ever resided upon the land, and their occupancy and improvement of it were confined to the times and acts stated.

The testimony does not show that the boundaries were in any manner designated. No compliance with "the act pre-

Libby v. Dalton.

scribing the mode of maintaining and defending possessory action on public lands in this State" was shown; and, in an action of ejectment for the premises, this was the extent of the plaintiff's proof of actual possession. The court refused a motion of non-suit. We think this was error.

The possession of the plaintiff as presented by the record is altogether too equivocal to maintain ejectment. It has frequently been determined that where possession is relied upon in ejectment it must be an actual, bona fide possession, a subjection to the will and dominion of the claimant as contradistinguished from the mere assertion of title and the exercise of occasional acts of ownership. The locality and appropriate use of the property may be important considerations in the determination of actual possession.

Judgment reversed and new trial granted.

WILLIAM LIBBY, APPELLANT, v. PETER DALTON *et als.*, RESPONDENTS.

NO NEW TRIAL FOR INSUFFICIENCY WHEN EVIDENCE NOT ALL BEFORE COURT. Orders denying motions for new trial on the ground of insufficiency of evidence, made upon statements failing to expressly show that all the evidence was before the court, have been uniformly affirmed.

NEW TRIAL FOR INSUFFICIENCY, GRANTED ON DEFECTIVE STATEMENT, WILL BE REVERSED. When the statement upon motion for new trial is the only statement used on appeal, the appellate court stands on the same plane as the court below in reviewing the evidence; and if, in a case where the statement fails to show that it contains all the evidence, a new trial has been granted on the ground of insufficiency of evidence, it will be reversed.

NEW TRIAL STATEMENT SHOULD AFFIRMATIVELY SHOW ALL THE EVIDENCE. Where the statement on motion for new trial does not affirmatively appear to contain all the evidence, the existence of other evidence will be assumed.

LONG ESTABLISHED RULE OF PRACTICE—STARE DECISIS. A rule of practice, long established and repeatedly sanctioned, will be adhered to, though it originated in error.

Libby v. Dalton.

APPEAL from the District Court of the Second Judicial District, Washoe County.

This was an action against Peter Dalton as principal and John S. Bowker and A. A. Longley as sureties, on an injunction undertaking to recover the sum of fifteen hundred and fifty dollars damages. There was a verdict and judgment for plaintiff in the sum of seven hundred and fifty dollars. Afterwards a motion for a new trial was made by defendants, on the grounds, among others, of excessive damages and insufficiency of the evidence to justify the verdict; and a statement was filed upon said motion, certified by the judge below to "set forth all the material testimony adduced at the trial."

Subsequently an order was entered granting a new trial, to take effect on March 31, 1873, unless before that time the plaintiff should remit all his damages over three hundred dollars. Plaintiff declined to remit, and appealed from the order.

R. M. Clarke, for Appellant.

I. The statement on motion for a new trial, which is also the statement on appeal, fails to show that it contains all the evidence. *Sherwood v. Sissa*, 5 Nev. 355; *Caples v. Central Pacific R. R. Co.*, 6 Nev. 271.

II. The court below could not impose terms and make the condition, that plaintiff consent to a reduction of his judgment, when the new trial was granted upon the ground of insufficiency of the evidence to justify the verdict.

Haydon & Cain, for Respondents.

I. The order granting a new trial on the ground of insufficiency of evidence was not error, though the statement did not show that it contained all the evidence. The statute

Libby v. Dalton.

does not require such a statement to show that it contains all the evidence; a statement can be disregarded for no other reason, except that it fails to specify the particular errors upon which the party will rely. Practice Act, Sec. 197. In California it has been frequently decided in late cases, overruling former decisions—such as 23 Cal. 103 and 24 Cal. 377—that the presumption is that all the testimony bearing upon the question is contained in the record. *Hidden v. Jordan*, 28 Cal. 303; *Smith v. Anthon*, 34 Cal. 511; *Clark v. Gridley*, 35 Cal. 403. In *Hidden v. Jordan*, 28 Cal. 313, the court says: “To require a certificate that the record contains all the evidence introduced on each point specified would only be to add so much useless matter.” We are aware that the Supreme Court of this State has seemed to follow the earlier decisions of California. *State v. Bond*, 2 Nev. 267; *Howard v. Winters*, 3 Nev. 543; *Sherwood v. Sissa*, 5 Nev. 355. In these cases it is held that the statement must show that it contains all the evidence produced at the trial, before a court will say that the verdict was not justified by the proof; but we submit, that the late California cases state the rule more in accordance with the statutes and legal principles than the earlier California and Nevada decisions. Ought not the same rule now prevailing in California also to prevail in this State?

II. In the case at bar, the court which tried the cause granted a new trial, and the appellant asks this court to reverse that decision. It is his duty to affirmatively show error in the decision before he is entitled to a reversal.

III. It is also objected that the certificate of the court below, that the statement is correct and sets forth all the material testimony adduced at the trial, is insufficient. In support of this proposition, we are referred to *Caples v. Central Pacific R. R. Co.*, 6 Nev. 271. But in that case the judge

Libby v. Dalton.

only certified that the statement contained all the evidence brought out at the trial; he failed to show that the statement was correct. Here the judge certified that it was correct. It was in accordance with the statute, and is sufficient.

By the Court, BELKNAP, J.:

The defendant was granted a new trial upon the ground of insufficiency of the evidence to justify the verdict. The statement fails to show that it contains all of the evidence. Orders denying motions for new trials made upon statements failing to expressly show that all of the evidence was before the court have been uniformly affirmed. Such rulings are based upon the presumption that all intendments being in favor of the verdict the omitted evidence would sustain it. It is not the intention of the law that the question of insufficiency of evidence shall be entrusted to the memory of the district judge, but to the statutory statement exemplifying the grounds upon which the motion is made. The statement used upon motion for new trial is brought here, and both courts stand upon the same plane in reviewing the evidence. But granting or denying a motion for a new trial rests in the sound discretion of the *nisi prius* court and its ruling will not be disturbed where there is any evidence to sustain it. This discretion springs from the opportunity of the district judge to observe the demeanor of the witnesses and to estimate the relative weight to be attached to conflicting testimony.

A new trial should not have been granted unless the statement contains all of the evidence, and we are asked to so assume since all presumptions are in favor of the order of the district court. The supreme court of California, to whose opinions we are referred, has adopted this rule, but not upon such reasoning. It proceeds upon the presump-

Libby v. Dalton.

tion that unless the contrary appears the statement does contain all of the evidence. But under a rule of practice long established and repeatedly sanctioned we have held that unless the statement affirmatively appears to contain all, we should assume the existence of other evidence. We must adhere to this rule; its disturbance now, even though it originated in error, would be unwise and tend to confusion.

The order of the district court granting a new trial is reversed.

By HAWLEY, J., dissenting:

The rule requiring that statements on motion for new trial must contain all the evidence where a verdict is sought to be reversed upon the ground of "insufficiency of evidence," was established by the appellate court, upon the ground that it was incumbent upon the party seeking the reversal affirmatively to show error, and that, in the event of a failure by appellant to show that the statement contains all the evidence, the appellate court presumes that every fact essential to sustain the judgment or order was fully proven. *Sherwood v. Sissa*, 5 Nev. 353; *Bowker v. Goodwin*, 7 Nev. 137.

Adopting the theory upon which this rule is founded, it seems to me, that when the court below grants a new trial, the same presumption follows. The presumption is always in favor of the action of the court below, and the burden of showing error always devolves upon the appellant. It is unnecessary for the respondent in any case to make any showing until the appellant has overcome the legal presumptions in favor of the correctness of the decision rendered against him, whether a verdict of the jury or an order of the court. *State v. Stanley*, 4 Nev. 75; *Sherwood v. Sissa*, *supra*.

In the present case it is not claimed that the evidence contained in the statement is not sufficient in law to author-

Marye v. Martin.

ize a new trial, but it is urged that the court below had no right to grant a new trial because it is not affirmatively shown by the statement that *all* the evidence presented at the trial was contained therein. I am unwilling to agree with this view of the case. I think that if there was any evidence produced at the trial (not included in the statement) tending to show error in the ruling of the court, it was the duty of appellant after the new trial was granted, to have prepared a statement on appeal containing all the evidence. *Dickinson v. Van Horn*, 9 Cal. 210.

Entertaining these views, I dissent from the opinion of the Court.

GEORGE T. MARYE, APPELLANT, v. J. P. MARTIN,
RESPONDENT.

ATTORNEY AS AGENT IN NEGOTIATION NOT IN COURT. Where a clerk converted mining stock of his employer and deposited the larger part of the proceeds in a bank, and afterwards, having confessed, was called to an interview with the employer and his lawyer in the private rooms of the employer; where, upon disclosing the deposit, he was sent by the lawyer for the certificate of deposit, which he brought, endorsed over and delivered to the lawyer; and also delivered over certain other moneys of his own to the lawyer, who received them without stating in what character he accepted the same; and the employer said nothing: *Held*, that the clerk was justified in regarding the transaction with the lawyer as done with his employer.

WAIVER OF TORT BY ACCEPTING MONEY PAID UNDER SUPPOSITION OF WAIVER.

Where a clerk had unlawfully converted the property of his employer and received the proceeds, and afterwards, upon being called to account by his employer, gave up all of the proceeds which he still had and other property of his own, which was accepted by the employer; and there was nothing said or done to disabuse the clerk of his supposition that the property was accepted in settlement: *Held*, that the effect of such acceptance was a waiver on the part of the employer of the tort of the clerk.

APPEAL from the District Court of the First Judicial District, Storey County.

Marye v. Martin.

This was an action to recover fourteen thousand dollars for alleged unlawful conversion of twenty shares of mining stock. The cause was tried by the court below without a jury, and judgment rendered for defendant. A motion for new trial having been denied, the plaintiff appealed from the judgment.

It appears from the findings that about November, 1871, plaintiff being the owner of twenty shares of the capital stock of the Savage Mining Company, one G. W. Lee, his clerk, wrongfully took it to the defendant, cashier of the Bank of California at Virginia City, and requested him to have it sold by Driscoll & Co., stock brokers; that defendant received the stock from Lee, without knowledge of the wrongful taking or of its ownership by plaintiff, and, without any intent to convert it to his own use, sent it across the street to Driscoll & Co., requesting them to sell it; that Driscoll & Co. sold it the same day in the regular course of business; that defendant the next day received nine hundred dollars, the proceeds of the sale, from Driscoll & Co., and paid the same over to Lee; that defendant received no remuneration for his services, but acted as he did as an accommodation to Lee; that Lee deposited six hundred dollars of the proceeds of the sale in the Bank of California at Virginia City, and kept three hundred dollars in coin; that in March, 1872, Lee informed plaintiff of the fact of his having taken and sold the stock, and that plaintiff thereupon consulted General Thomas H. Williams, attorney at law, touching the subject matter.

The findings proceeded as follows: "On the 15th of March plaintiff, Lee, and said Williams, had an interview at the private rooms of plaintiff, at the request of plaintiff, when Lee, among other things, disclosed the names of the persons through whom the stock had been sold. Plaintiff repaired to the bank and notified defendant that by the advice of his counsel, Williams, he intended to hold him responsible for

Marye v. Martin.

the sale of this stock. During this absence of plaintiff from the room, Lee went after this certificate of deposit for \$600, which he had, the part proceeds of the sale of the stock. Plaintiff returning, inquired of General Williams where he had gone, and was informed in reply that he had gone for some money. Presently Lee came in and handed Williams an envelope containing this certificate of deposit. Plaintiff was asked for pen and ink, which was procured. Williams then requested plaintiff to leave the room, which he did. Lee then indorsed said certificate of deposit and delivered it to Williams. Shortly after this and the same day, Lee gave Williams, payable to his own order, a check for \$217 22. Williams took this \$817 22, and made a special deposit of it in the agency of the Bank of California in his own name, plaintiff being present at the time in the bank. Williams then told plaintiff the amount of money which he had recovered from Lee, but told plaintiff that he (plaintiff) had nothing to do with it, that it was his (Williams') own transaction. Williams also stated that it was his intention to pay over the money to the party who would be the sufferer by the said wrongful act of Lee. The \$817 22 is still upon special deposit in the name of Williams."

The court below further found that General Williams was acting at the interview and proceedings above mentioned as the attorney and adviser of plaintiff; that Lee paid the money to Williams for the benefit of plaintiff; that on March 15, 1872, Savage stock sold in the market for \$230 per share, and advanced from that time until April 22, 1872, when it sold for \$725 per share, the highest price; and that plaintiff replaced the twenty shares taken from him by Lee at \$340 per share.

Williams & Bixler, for Appellant.

I. There is no finding that Williams was the agent of appellant in the matter of receiving money from Lee, nor

Marye v. Martin.

that he assumed to act as such agent, or represented himself by act or word as such, or that appellant so held him out, nor that Lee dealt with Williams as an agent, or believed him such, or had any reason to believe him such. The only findings pertaining to the relations between appellant and Williams are to the effect that Williams was, in an interview and proceedings among the parties, acting as the attorney at law, counsellor, and adviser of the appellant. What "proceedings" are meant may be a matter of doubt; but assuming that the meaning is that Williams, as the attorney at law of Marye, received the money given him by Lee, that would still fail as a defense, for the reason that the act would not have been within the scope of the attorney's authority and therefore not binding on Marye. 5 Dana, 11; 34 Penn. State, 318; *Noland v. Jackson*, 16 Ill. 272; *Wilson v. Wadleigh*, 36 Maine, 496; 15 Ver. 314; 3 Watts & Serg. 420; 1 Smede & Mar. 248; 2 id. 81; *Jewett v. Wadleigh*, 32 Maine, 110; *Garvin v. Lowery*, 7 Smede & Mar. 24.

II. If the word proceedings, used in the finding, comprehends the receipt of the money, then it also embraces the disposition of it. It therefore follows that Williams was authorized by Marye to obtain \$817 from Lee, and deposited the same with the Bank of California for the benefit of the loser by Lee's wrongful act, and not for the benefit of Marye; which is very far from a settlement and condonation of the wrong. To constitute the agreement necessary to establish the alleged ratification, it should first appear that Lee paid the money to Williams with the intent and belief that it was in settlement of the wrong, and next that Williams received it with the same intention, or that the circumstances were such that the law will infer that intention and estop him from claiming otherwise.

III. Even if appellant had done personally all that Williams did, there would yet be wanting sufficient to sustain

the claim of settlement, for the reason that there was no agreement of settlement; that there was no intention on the part of Marye to make a settlement, or anything to justify Lee in the conclusion that he intended a settlement; and that the acceptance of the whole or of part of the proceeds of the wrongful sale could only be considered in mitigation of damages. 17 Pick. 1; 11 Missouri, 219; *Burn v. Morris*, 4 Tyrwhittle, 485.

IV. It is very clear and conclusive, from the testimony, that appellant had no desire, purpose, or intention of making the alleged settlement with Lee, and did not in person do so, or commit any act which can be tortured into proof of such a settlement. On the contrary, everything which he did was to the reverse of the proposition. It seems to us that a court will not allow an unauthorized, unsolicited agency to be thrust upon a man, and hold him responsible for the consequences resulting therefrom, except upon the strongest proof that he has done something which caused injury to another, and under such circumstances as to make it unjust to allow him to repudiate the consequences legitimately resulting from his own conduct.

V. How could Lee have been misled to his injury by appearances leading him to an erroneous conclusion concerning Williams' authority? He lost nothing by the operation, because he only surrendered the custody of money not his, but rightfully belonging to another, and that money was deposited in a safe place, to be held for the rightful owner. Lee will receive no legal injury if Martin finally gets the \$817, which Lee unjustly obtained from him, and certainly Martin will have no cause of complaint. It is claimed that appellant waived Lee's wrongful act by reason of the alleged receipt of the fruits of the wrong. But a waiver is an intentional relinquishment of a known right. *Shaw v. Spencer*, 100 Mass. 395. Here it is clear that there has been no such waiver or attempt at waiver.

Marye v. Martin.

Mesick & Wood, for Respondent.

I. As to the agency of Williams there can be no doubt under the findings. If he was not agent for the plaintiff in those transactions with Lee, what was he? He was acting with the plaintiff, for him and at his request, and in his room, and about his business, and for no other known person, and got from Lee \$600 of the proceeds of the conversion and \$217 22 of other money; and the matter of the taking of the stock and the disposition of it and the making of amends by Lee to plaintiff seems to have been the entire business between the parties. In view of these facts how could any court find otherwise than that Williams was acting as the agent of the plaintiff? Such facts and circumstances must necessarily outweigh the simple declaration of Williams to plaintiff, unchallenged as it was and made after they had got the money from Lee, that "you, Mr. Marye, have nothing to do with it; this is my own transaction." Instead of that remark disproving the agency, it confirms it under the circumstances, and shows a manifest design thereby to make testimony against the agency and legal consequences legitimately flowing from their previous acts.

II. The court has found distinctly that in all these transactions Williams *acted*, not pretended to act, as the attorney of the plaintiff. The word attorney when used without qualification and not in connection with any proceedings in court means the same as agent or attorney in fact. The authorities cited by appellant relate to attorneys at law in the management of legal proceedings and have no pertinency to the question in hand.

III. The agency of Williams being established, the payment by Lee of the \$217 22, not appearing to be a part of the proceeds of the sale of the stock, in connection with the \$600, amounted in law to a waiver of the plaintiff's right of action against the defendant and others, mere instru-

Marye v. Martin.

ments in the sale of the stock. We do not contend that such is the effect of a return by the wrong doer to the owner of a part of the property taken or of the proceeds of its sale; for that only amounts to restoring the property to its owner and can therefore only go in mitigation of damages. There is no contract between the parties involved in the proceeding. The owner only takes back what belongs to him, and of course ought not to recover for what is restored. But when the owner enters into a contract with him, who has deprived him of his property, for a settlement of the wrong and actually receives payment of the whole or a part—accepts an agreement to pay the whole or a part—the case stands upon entirely different grounds. The parties have then taken the matter out of the hands of the law as a mere tort, and have made it the subject of contract between themselves. And when it becomes the subject of contract between the parties it ought not to remain, and according to the authorities will not remain, a tort actionable in the courts against mere instruments in effecting the sale of property taken but not participating in its taking. 11 Wis. 180; 18 La. An. 147; 2 Mass. 105. Story on Agency, Sec. 254.

IV. To whom under this evidence would the courts award the money on deposit in the name of Williams? It cannot be the property of Williams, unless it was made a gift to him by Lee or the plaintiff; and that is not claimed on the part of any one. The defendant has no right to it, for Lee parted with it upon the understanding that it was to go to him under any contingency; and at the time of its receipt by Williams, according to the evidence, Williams was not in the interest of the defendant; and defendant was not relying on Williams for any favor or protection whatever, and there was no privity between them. Lee could not recover it back upon any other ground than of his having been defrauded out of it by false pretenses. The result is that

Marye v. Martin.

upon any fair theory, no one but appellant could legally claim the money from Williams.

By the Court, WHITMAN, C. J.:

One Lee, clerk for appellant, converted twenty shares of mining stock, appellant's property; by the kindness of respondent sold the same through his brokers at less than usual commissions; received nine hundred dollars or thereabouts, of which he deposited six hundred. Afterwards he confessed his dereliction, but refused to name the party through whom he sold. Shortly after, appellant with General Williams, an attorney at law, had an interview with Lee in the private rooms of appellant, when and where Lee divulged the name of respondent as the party through whose offices he had disposed of the stock, disclosed the amount obtained therefor, and delivered to General Williams the certificate of deposit for six hundred dollars, portion of the proceeds of the sale; also the check of Driscoll & Co. for \$217 22, amount due from them to Lee for wages, he having been for some time previous in their employ.

This money was taken by General Williams, and by him specially deposited in bank, with the announced intention of delivery to the loser in the transaction. Lee, however, was never informed of this intention. His remembrance is, that he indorsed the certificate of deposit before appellant and delivered it to him: this is denied by appellant and General Williams, who testify that appellant left his room by request of General Williams, immediately after furnishing pen and ink, being told that the transaction about to be had was General Williams' own. However that may be, Lee surrendered that certificate and gave up his own money, as he supposed to appellant, on account of the converted stock.

Marye v. Martin.

Was he justified in such supposition by the acts of the parties? And first as to the capacity in which General Williams acted. Lee calls him counsel for appellant, his lawyer. Appellant says that he invited General Williams to be present as a friend; that nothing was said about his acting as attorney, but if he so considered himself that it is all right. General Williams disclaims any intention to act for appellant, but says he got the money from Lee and holds the same for the benefit of the losing party.

Lee, however, as has been said, knew nothing of this intention; he saw appellant and General Williams acting apparently as one; and he gave the money to one as to the other; he was kept in the dark as to the use to be made of the money and certainly acted according to his lights, when he supposed that he was paying out his own money, in addition to giving up the remnant of the proceeds of the sale of the stock, in settlement to that extent of his wrong. If he was sane, he could have had no other idea. He was called to an interview with appellant and General Williams in the private rooms of appellant; he was then and there asked by appellant what he had done with the money received for the stock; he confesses; General Williams then sends him for the certificate of deposit, which is indorsed and delivered in the presence of and to appellant—according to Lee's remembrance; not so according to General Williams, who is positive while appellant is uncertain upon the point; but General Williams is undoubtedly correct, as he had a plan which he was engaged in carrying out unknown either to Lee or appellant, which would naturally fix the exact facts firmly in his memory. Lee then told appellant that he had some money with Driscoll & Co. General Williams ascertained the amount and afterwards, in absence of appellant, took the check of Driscoll & Co. therefor.

Any person, it would seem, would have been perfectly justified in considering a thing, done under the circum-

Marye v. Martin.

stances of the interview as to its subject matter with General Williams, as done with appellant, without entering into any nice distinctions as to the special capacity in which the former was acting. Of course, as attorney, pure and simple, he would have had no authority to compromise his client's rights, nor would the client be bound thereby, except on previous instruction or subsequent ratification; but this does not seem to have been the limit of his position as regarded by appellant. He was to him more than agent or attorney; he was mentor, guide, philosopher and friend, and more. There seems to have been a merger of identity, and for the nonce Williams was Marye, while *he* was suspended as actor.

Appellant calls General Williams to assist in ascertaining, for one thing, the whereabouts of the money received on sale of the converted stock; then, with complete self abnegation, leaves his own room at General Williams' request, so soon as that information has been obtained, that General Williams may have a private transaction with Lee about that very money. He is in the bank and sees General Williams make a special deposit of money, which he "suspected" had been obtained from Lee and says nothing; though, as one of the objects of the interview was to obtain knowledge as to that money, he would naturally have evinced some interest at such a peculiar deposit, had not he looked upon General Williams as his very self. He afterwards sees Williams, who tells him that he had gotten from Lee the certificate of deposit and the money due from Driscoll & Co. and had deposited the same in his own name at the bank, saying at the same time, "This is my own transaction; you have nothing to do with it; and I intend to hold the money for the benefit of the party who loses by this affair; whoever loses I will pay it to." Still he said nothing, out of his implicit trust; and possibly for the reason that he hoped that such a transaction could be carried out, (although a moment's

Marye v. Martin.

thought would have told him the contrary,) that he might preserve his remedy against respondent, whom he had already warned of liability and intention to hold; and, if unsuccessful, then that he might fall back upon the money thus held for the benefit of the loser.

The law allows no such double stringing of bows. The moment appellant was told that part of the proceeds of the sale of the stock and other moneys, property of Lee, had been obtained from him by General Williams as the result of the interview before spoken of and did not repudiate the transaction so far as he was concerned, he, as to Lee, induced the belief that his tort was waived and that he stood a simple debtor of appellant. Any other view would tend to work a great wrong upon Lee. Remember always, that he not only disgorged the remaining proceeds of that tort, but also gave up his own money. What for? Undoubtedly for protection; he was thereby to escape legal consequences, other than mere repayment. His position, if appellant's theory of the result of the interview be correct, is idiotic—deprived of his money and unbenefited by its surrender. His testimony as to his understanding of the effect of the payment is consonant with reason and should be received; he supposed he was making a settlement; and from the facts, on which alone he could base his reason, the law will so hold.

If Lee so believed, as he swore, and if he might rightfully and lawfully so believe, then such was the fact, notwithstanding any contrary intention of appellant and General Williams or either of them. If such was the fact, then there was no cause of action against respondent: So the preponderance of the evidence, wherefore the motion for a new trial was properly denied. The findings, that appellant had the knowledge recited above and that Lee paid the money to General Williams for appellant's benefit, sustain the judgment.

It is affirmed.

REPORTS OF CASES
• DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
OCTOBER TERM, 1873.

MARY J. CONNERY, APPELLANT, *v.* S. T. SWIFT *et al.*,
RESPONDENTS.

REMEDIES AGAINST JUSTICES' JUDGMENTS—WHEN EQUITY WILL NOT INTERFERE.

If a judgment for plaintiff by a justice of the peace is erroneous, the remedy of defendant is by appeal; if void, the execution upon it may be set aside by motion; if both these remedies are lost without fault, it must still appear that defendant has no other adequate and complete remedy at law before equity will restrain the enforcement of the execution.

"NO VISIBLE PROPERTY" NOT EQUIVALENT TO "NO PROPERTY." An averment that a person "has no *visible* property exempt from execution" is not equivalent to an averment that he is insolvent or unable to respond in damages.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action against S. T. Swift, sheriff of Ormsby County, and C. M. Taylor, to enjoin proceedings on execution under a judgment recovered before a justice of the peace in favor of Taylor and against Mary J. Connery, then Mary J. McCormas. It appears from the complaint that Taylor, about June, 1872, commenced suit in a justice's court in

Connery v. Swift.

Genoa Township, Douglas County, against Thomas McCormas and Mary McCormas for \$180; that after service and upon the day set for trial a default was entered against Mary McCormas; that about the same time the suit was, on motion of Thomas McCormas, certified to the district court on the ground that it involved the title to real property; that in December, 1872, after a hearing in the district court, the case was certified back to the justice for further proceedings; that on December 23, about six months after the entry of default against Mary McCormas, judgment was entered in favor of Taylor generally for \$180 and costs; that a certified transcript of such judgment was filed and docketed in the district court; that on March 31, 1873, an execution was issued thereon to the defendant Swift as sheriff of Ormsby County; and that on April 19, 1873, said sheriff levied upon a piano forte, the separate property of plaintiff, which he threatened to sell, and to restrain the sale of which this action was brought.

The complaint alleged several reasons on account of which the justice's judgment was claimed to be void—one that it had not been entered in four days after default; another that no general judgment could be entered, for the reason that there had been no trial or default as to Thomas McCormas. It further alleged that plaintiff was not indebted to Taylor but that Taylor was indebted to her; that when the case was to come up in the justice's court she was about to telegraph to Carson City for counsel to appear for her; that Taylor, learning of her intention so to do, assured her that there was no occasion or necessity of putting herself to that trouble or expense as he intended if possible to enforce his claim against Thomas McCormas, but in no event would he ask anything as against her; that Taylor at the same time agreed to pay her the amount due her as soon as he should recover from Thomas McCormas; that acting upon

Connery v. Swift.

such assurances and agreement she made no defense; that it was also agreed in the district court, when the case was certified back to the justice's court, that if any further proceedings were to be taken in the justice's court her attorney was to have timely notice; that no notice of application for judgment was given until after the period for appeal therefrom had expired; that all the foregoing proceedings were in fraud of her rights; that her remedy by appeal having been lost, she had tried *certiorari*, which had failed; that Taylor had "no visible property exempt from execution," and that she was without adequate remedy at law.

In response to the prayer of the complaint, a preliminary injunction restraining the sale was issued and also an order to show cause why such injunction should not be continued in force. Upon the hearing, the defendant Taylor presented a very full answer, specifically denying all the above mentioned charges and setting up that when he commenced his suit in the justice's court, Mary McCormas, desiring to injure and embarrass her then husband Thomas, requested him to commence it as he did.

The preliminary injunction was dissolved, and plaintiff appealed from the order.

T. W. W. Davies, for Appellant.

I. The so-called judgment was void and a nullity, because not entered within four days after the default (Practice Act, Sec. 552); also, because, if against any one, it was against the defendants therein generally, and no trial had been had, or default entered, as to Thomas McCormas. It could only have been valid as against him, because he and said Mary were then husband and wife. 1 Ker. N. Y. 301.

II. The judgment in the justice's court being void, it may be attacked either directly or collaterally, and defendant

Connery v. Swift.

therein is entitled to protection by injunction. Hilliard on Injunctions, 650; 10 Missouri, 772; 9 Cal. 172; 12 Cal. 283.

George P. Harding, for Respondent.

I. Whether the judgment was void or voidable, the plaintiff had remedies at law, speedy, complete and adequate, for the presentation of all her rights in the premises. To say nothing of her remedy by appeal, the justice who rendered it had power to withhold or arrest process issued to enforce it; when the transcript of the judgment was filed in the district court, the latter court had the same power, in respect to the execution issued therefrom; or plaintiff might have obtained a review of the action of the justice, so far as jurisdiction was involved, by *certiorari*.

II. If plaintiff's property was seized to satisfy a void judgment, not only the officer making such seizure, but the judgment creditor directing such officer would place himself as to her in the attitude of a naked, unauthorized trespasser, liable in damages. And in view of the record in this case, the court will not infer or presume any inability on the part of Taylor to respond in damages.

III. The provision in the Practice Act (Sec. 552) requiring the entry of judgment within a given time, is merely directory. *Fugitt v. Cox*, 2 Nev. 370. It cannot be construed as imperative, or as fixing an impassable landmark of judicial power, without violence to the object of the law; which could have been none other than to encourage reasonable dispatch in the determination of actions.

IV. The rendition of judgment by the justice was at most only an irregularity. The contract, on which suit was brought, being joint, the judgment was properly entered against both defendants. But if Mary McCormas was improperly joined as defendant in that action, she should have

Connery v. Swift.

demurred on the ground of misjoinder; and the fact that she did not, leaves us to conclude that she was properly made a defendant.

By the Court, HAWLEY, J.:

Plaintiff seeks to enjoin the sale of certain personal property under an execution issued upon a judgment rendered against her in a justice's court, and bases her claim for relief upon the grounds: 1st, that the judgment is a nullity; 2d, that it was obtained by fraud. At the hearing upon the question of fraud, the court dissolved the temporary restraining order theretofore issued. From this order plaintiff appeals.

From the pleadings we think the only ground upon which plaintiff would be entitled to the relief sought is that of fraud; and it is not contended that the court erred in deciding that question adversely to plaintiff. If the judgment was erroneous, the remedy of plaintiff was by appeal; if void, she had a remedy by motion to have the execution set aside. If these remedies have been lost, without any fault or negligence of plaintiff, and if we concede that the judgment is entirely void (a question we have not examined), still there is no necessity for the interference of a court of equity to restrain the enforcement of the execution, because there is no showing that plaintiff cannot have an adequate and complete remedy at law. There is no allegation that defendants are insolvent or unable to respond in damages. The averment "that said C. M. Taylor, defendant herein, has no *visible* property exempt from execution" is not sufficient. Moreover, the averment is positively denied in the answer. The restraining order was properly dissolved.

The order appealed from is affirmed.

Ex parte Roberts.

EX PARTE J. BEDFORD ROBERTS.

CRIMINAL LAW—UNCERTAINTY IN SENTENCE. Where a person was sentenced to imprisonment in the State prison for a term of one year, to commence upon the expiration of another term; and one year afterwards the first judgment and sentence were adjudged void: *Held*, on habeas corpus, that the sentence either commenced to run immediately on rendition and had expired, or it was void for uncertainty, and in either case the prisoner was entitled to his discharge from the State prison.

VOID JUDGMENT VOID AB INITIO. Where on appeal a conviction for crime is adjudged void, it is not the decision of the Supreme Court that makes it void; it is void *ab initio*.

HABEAS CORPUS before the Supreme Court. The writ was issued on the petition of A. C. Ellis, and directed to P. C. Hyman, warden of the State prison. In his return the respondent set forth that he held Roberts in custody by virtue of a judgment of the district court of Ormsby County, rendered on March 11, 1872, sentencing him to imprisonment for the crime of State prison breaking; that he had held him from July, 1871, by virtue of a sentence to a term of ten years for highway robbery; that on May 7, 1873, the judgment and sentence for highway robbery had been reversed (*State v. Roberts*, 8 Nev. 239); and that since such reversal he had held him only under the first mentioned judgment.

The return contained a copy of the judgment and sentence, from which it appeared that Roberts was one of a number who had escaped from the State prison on September 17, 1871. Being afterwards apprehended and indicted for prison-breaking, they pleaded guilty and were sentenced to imprisonment in the State prison for the term of one year, "such term of imprisonment to commence upon the expiration of any term or terms of imprisonment which you may now be undergoing in said State prison."

Ellis & King, for Petitioner.

I. The judgment of March 11, 1872, was void for uncertainty. It sentenced petitioner to a term of one year, to

Ex parte Roberts.

commence upon the expiration of the term which he was at that time undergoing. The word "expiration," here used, means not the expiration of a term as matter of fact, but the expiration of a term as *matter of law*. As matter of law, there was no term. The former conviction being void could not create any term. There never was a commencement of any such term, and necessarily there could not be any expiration of it. The term in question, therefore, as it was to commence upon such impossible expiration, never could commence.

II. If the judgment of March 11, 1872, ever took effect at all, it took effect immediately on its rendition; and, the term of one year therefrom being now expired, the petitioner is on this ground also entitled absolutely to his discharge.

L. A. Buckner, Attorney General, for Respondent.

I do not see how it can be a question in this case whether the judgment for robbery was void or voidable. From an inspection of that judgment, there is no doubt that the district judge had jurisdiction of the subject matter of the indictment and of "the person of the defendant." That judgment was not void, but only voidable. *Ex parte Tobias Watkins*, 3 Peters, 202. It was in force, however erroneous, until reversed. *Browne v. Commonwealth*, 4 Rawle, 259. A year has not expired since that reversal, and petitioner is therefore not entitled to his discharge.

By the Court, BELKNAP, J.:

Under a judgment of conviction for prison-breaking, the petitioner was on the 11th day of March, 1872, sentenced to confinement in the State prison for the period of one year, to commence upon the expiration of a term of imprisonment

Neil v. Wynecoop.

which he was then undergoing for robbery. The trial of the robbery case was had out of term, and upon appeal we decided that the judgment of the district court rendered therein was void, and ordered a new trial. (*State v. Roberts*, 8 Nev. 239.) The petitioner is confined in the State prison. Application is made for his release by writ of habeas corpus, upon the ground that the judgment of the 11th of March, 1872, is void for uncertainty, since it depends upon an impossible condition, or that the sentence thereunder commenced running upon its rendition, and has now expired by limitation.

In behalf of the State, it is contended that the sentence of the 11th of March, 1872, took effect upon the 7th day of May, 1873—the date of the reversal of the judgment in the robbery case. The decision of this court did not make that judgment void; it was void *ab initio*, and the sentence and imprisonment under it were, in legal contemplation, nullities. Either the judgment of the 11th of March commenced to run upon its rendition or it is void for uncertainty, and in neither case is the warden of the State prison entitled to the custody of the prisoner. A new trial having been awarded him, he must be remanded to the custody of the sheriff of Washoe County.

It is so ordered.

JOHN S. NEIL, APPELLANT, v. WILLIAM M. WYNE-
COOP, RESPONDENT.

PRACTICE IN CASES OF CONTEST FOR PUBLIC LAND. Cases of contest for public land under the act of March 4, 1871, being governed by the provisions of the Practice Act so far as applicable (Stats. 1871, 135, Sec. 12), a statement on motion for new trial in such case, which contains no specifications of error, is insufficient.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

Neil v. Wynecoop.

This was a controversy between the parties as to a preferred right to purchase of the State a tract of eighty acres of land in township 15 north, range 19 east, in Ormsby County. In accordance with the statute of March 4, 1871, providing for such cases, the contest was certified from the register to the district court. A trial was had, and the result was a judgment for defendant. Plaintiff then moved for a new trial, and a statement on such motion was filed, containing all the testimony, but no specifications of error. The motion having been overruled, plaintiff appealed from the judgment and order.

T. D. Edwards and Ellis & King, for Appellant.

R. M. Clarke, for Respondent.

By the Court, WHITMAN, C. J.:

It is provided by statute in this State that “ * * when two or more persons, claiming a preferred right by reason of occupancy or possession, apply to purchase the same lands, the register shall certify such applications to the district court of the county in which such lands are situated and notify the contesting applicants thereof. The judge or court shall then appoint a commissioner in the vicinity of the land so in dispute to take and report to such court all the testimony of the parties in the case. The contest shall then be tried and determined as ordinary actions in said court * * *.” Stats. 1871, 138, Sec. 12.

Under this section the case at bar was tried. The appellant here moved for a new trial. It is objected that his statement contains no specification of error; to that it is answered that this case is *sui generis* and the provisions of the general Practice Act inapplicable. Under the statutory language, there can be no doubt that this position is incor-

State v. Newman.

rect. Such cases, after a certain point, are to be tried and determined as ordinary actions.

Of course, reference must be had to the Practice Act, to ascertain and determine how such actions are tried; and the governing rules, so far as applicable to the individual case, must be adopted. It by no means follows, because this action differs from ordinary actions in important respects, that it cannot in all others be governed by the rules of practice pertaining to such cases. In fact, the very appearance of appellant here is proof of this view. If not found in the rules of ordinary practice, whence comes his right to move for a new trial? The objection to the statement is sustained. *Corbett v. Job*, 5 Nev. 201.

The order denying a new trial and the judgment are affirmed.

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM M. NEWMAN, APPELLANT.

LARCENY OF PROPERTY STOLEN IN AND BROUGHT FROM ANOTHER STATE. If a person commits larceny in one country or state and carries the goods stolen into another country or state and there makes any removal or asportation of them, having in his mind the intent to steal, he may be properly indicted for larceny of them in the latter locality.

MERE POSSESSION WITH FELONIOUS INTENT OF PROPERTY STOLEN IN ANOTHER STATE NOT LARCENY. In a trial for larceny of property, which had been stolen in another state and brought into this State, the court instructed the jury that if the accused was in possession of the property in this State with a felonious intent to steal, take and drive it away, it should convict, though the original taking away had been in another state: *Held*, error.

NO LARCENY WITHOUT ACT AS WELL AS INTENT. Mere possession of another's property, with intent to steal it, is no larceny, until intent is ripened into act.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

State v. Newman.

Defendant was indicted, with Vincent Moore and Robert McCausland, of the crime of grand larceny, alleged to have been committed in Lincoln County, Nevada, on or about May 15, 1872, by stealing a cow and heifers, the property of John Pulcifer, and a heifer, the property of the Hebron Stock Association. It appeared that the cattle described had been pasturing on a ranch in Utah Territory, from which they were stolen and driven to a ranch in Meadow Valley, Lincoln County, where they were found.

Defendant alone appeared for trial. Having been convicted and his motion for a new trial overruled, he was sentenced to imprisonment at hard labor in the State prison for the term of three years. He appealed from the judgment.

Pitzer & Corson, Bishop & Sabin and J. C. Foster, for Appellant.

I. No indictment for larceny lies in the courts of this State where the property has been stolen in another state or territory, and brought into this State. *State v. Brown*, 1 Hayward, (N. C.) 116; *People v. Gardner*, 2 Johns. 478; *People v. Schenck*, 2 Johns. 479; *Simmons v. Com.*, 5 Binn. 617; *Simpson v. State*, 4 Humph. (Tenn.) 456; Dissenting Opinion in *Hamilton v. State*, 11 Ohio, 435; *Commonwealth v. Upsichord*, 3 Gray, 434.

II. Our criminal code was copied from the criminal code of New York, as it existed when the above cited cases of *People v. Gardner* and *People v. Schenck* were decided. Does this not show a clear intent on the part of our legislature that the rule adopted in those two cases should be the rule in this State?

III. The first instruction given by the court is erroneous in several important respects. It assumes that the cattle had been stolen. It declares that if defendant had the

State v. Newman.

property in his possession, with intent to steal it, he must be found guilty. In other words, that having property in possession, with intent to steal it, constitutes larceny. This was the principal instruction given in the case, yet in it the court gives an entirely new and original definition of larceny, not found in the books.

IV. The proof was insufficient to justify the verdict. There was not sufficient evidence that a larceny had been committed to warrant a conviction. The ownership of the cattle was not sufficiently proved. The circumstances proven tending to connect Newman with the cattle were too vague and unsatisfactory to warrant a conviction upon them.

L. A. Buckner, Attorney General, for Respondent.

I. An indictment for larceny can be supported where property is originally stolen in one of the United States and carried into another, where the indictment is found. This question was thoroughly discussed in Massachusetts in *Commonwealth v. Upsichord*, Leading Crim. Cases, 371, and *Commonwealth v. Holder*, 2 Leading Crim. Cases, 377. These cases have been followed in Connecticut, Maryland, Vermont, Ohio, Mississippi, and Kentucky. A contrary doctrine has been held in North Carolina, New York, Tennessee, Louisiana, Indiana, Iowa, and New Jersey. The question in the case at bar, however, differs from that discussed in the cases above referred to. Here the indictment charges the larceny to have been committed in Lincoln County, Nevada. There is therefore no analogy between this case and that of *Simmons v. Commonwealth*, 5 Binney, 617, cited by appellant. There the Pennsylvania jury found, by special verdict, "that the defendant did feloniously steal, take, and carry away the goods * * * * within the state of Delaware, and that he brought them into the city of Philadelphia." The judges properly refused to sentence the prisoner under

State v. Newman.

those circumstances, while doubtless the facts would have warranted a conviction and sentence for larceny in Pennsylvania. See 1 Bishop's Crim. Law, 106, Sec. 106. Here the evidence established the facts, in addition to possession, that he had no right to the possession and that he had the felonious intent to appropriate the cattle to his own use, and did so by selling them. This established the complete offense in Lincoln County, Nevada.

II. In the New York cases of *People v. Gardner*, 2 Johns. 478, and *People v. Schenck*, 2 Johns. 479, it was held that where the original theft was in another state, and the stolen property brought into the state where the indictment was found, it could not be supported; but it will be remarked that those cases were on common law grounds. Afterwards a statute was enacted in that state, embodying the contrary or Massachusetts view.

III. The first instruction was not erroneous. If the testimony showed that the original taking was in Utah, and that in addition to the guilty possession, the defendant feloniously appropriated the said property to his own use, knowing who the real owner was, *these facts* made a distinct offense against the laws of this State, triable in Lincoln County. 1 Bishop's Crim. Law, 108.

By the Court, WHITMAN, C. J.:

The appellant was convicted of grand larceny. It was shown by the evidence, so far as there was any showing, that the property, the subject of the larceny, was stolen in Utah Territory. The indictment was for larceny in Lincoln County, State of Nevada.

This state of facts brings up the often and variously decided objection, that no conviction can be had, in one state of this Union, for a larceny committed in another or in a

State v. Newman.

territory thereof. Thus baldly put, of course no authority could be found to sustain; but convictions have been had upon the principle which allows one stealing in a county of a state to be indicted and tried in any other to which he carries the stolen property, upon the ground that, the title being in the true owner, every moment's continuance of felonious possession is a new crime under the same law. *State v. Brown*, 8 Nev. 208. As every state of this Union is, as to its laws and their administration, a foreign country to every other, there can be no analogy between the cases; and thus, despite the very considerable authority in affirmation of this proposition, the weight of precedent and reason is against it. In Massachusetts and other states where the doctrine prevails, it is evidently held more because the rule is established; while the reason is clearly with the dissenting judges. *Com. v. Holder*, 9 Gray, 7; *State v. Ellis*, 3 Conn. 185; *State v. Hamilton*, 11 Ohio, 435; *State v. Bartlett*, 11 Vt. 650.

The true reason and authority, however, for an indictment and the rule upon which it can be sustained under facts similar to those of the present record, have been well elucidated by Mr. Bishop in his chapter on "Acts punishable equally by our government and by a foreign government," and to some extent the same were foreshadowed in *The State v. Watson*, 36 Miss. 593 and *Com. v. Ferrill*, 1 Duvall, 153. As it is impossible to condense the argument of the text writer, so perfectly crystallized is it, the whole will be quoted, although more comprehensive in scope than is absolutely necessary for this decision:

"Under the last two sub-titles this matter was somewhat considered; but it may be well to observe here, that supposing an act to be equally punishable by two sovereignties it does not necessarily follow that both sovereignties will deem it wise to execute the punishment—a matter to be further considered elsewhere. On the other hand, if an act is prop-

State v. Newman.

erly punishable by another sovereignty, yet the foreign sovereign does not see fit to avail himself of his right to punish it, this liability of punishment abroad furnishes no good reason why we should not punish it when it has been committed in violation of our laws.

“But when we come to the application of these principles, we sometimes meet with differences and embarrassments. Particularly have conflicting opinions been entertained whether, if a man commits larceny of goods in one country, or in one state of our Union, and carries the goods into another country or state, he can be indicted for larceny of them in the latter locality, in analogy to the rule which holds where goods are stolen in one county, and carried by the thief into another one within the same state. Now, this form of the question being the common form, betrays the misapprehension out of which the differences have arisen. Our courts cannot punish offenses against a foreign government; neither can a man excuse himself for a criminal act here, by alleging that he did the same thing elsewhere. From which propositions we conclude, that as a question of principle, a man can neither be punished nor escape punishment for a larceny here, by reason of his having committed it also in another state or country.

“Therefore when a jury sitting in Pennsylvania, found by special verdict ‘that the defendant did feloniously steal, take, and carry away the goods * * * within the state of Delaware, and that he brought the same into the city of Philadelphia, within the jurisdiction of this court,’ the judges properly refused to sentence the prisoner (*Simmons v. Commonwealth*, 5 Binn. 617,) while doubtless the facts would have justified the jury in convicting him of larceny in Pennsylvania. Always, when a man has with him property in the state where the inquiry arises, the courts look into the legal relation he sustains to it there; if he stole it in another state, he has not even the right to its custody in the new

State v. Newman.

locality, and the rule of larceny is, that when a man, having in his mind the intent to steal, makes any removal or carrying away of goods to the custody of which he has no title, he commits the crime. Consequently, in the above case, the finding by the jury of a larceny in Delaware was irrelevant; while, in omitting to say whether there was a removal of the goods by trespass with intent to steal them in Pennsylvania, it was defective.

“The question now under consideration, differs in one aspect, from that of goods stolen in one county and conveyed by the thief into another county within the same state. In another aspect it is the same question. No indictment can ever be maintained, unless the proof establishes a complete offense in the particular county in which the indictment was found. But where the first taking was in the same state though in another county, the court can see the relation of the thief to the property, after he brings it into the county of the indictment, to be that of a felonious possessor; and so can infer a larceny in the latter county, from the mere fact of possession. Yet where the first taking is abroad, no such inference can be drawn from the mere possession; while if inquiry establishes something done in this state, beyond merely having possession here, then the fact of there being in the possessor here no right to the possession, to the custody, or to any handling whatever of the property, added to the proof of intent to appropriate it wrongfully here, with a knowledge of the ownership being in the other, establishes the complete offense. Our courts indeed have no occasion to try, neither have they jurisdiction to try, larcenies committed abroad, against the laws of foreign governments. But they can try all offenses against our laws; and if a man has property in his hands here, they can inquire what legal relation he sustains here to this property; and if it came with him from a foreign country, the relation he sustained to it there establishes his relation to it here.

State v. Newman.

This is familiar law, undisputed, practiced upon daily in all our tribunals, in the ordinary matters of litigation.

“The proposition that a man is to escape punishment for the violation of our laws, because he first violated the laws of a foreign country, is absurd in itself and mischievous in its practical application. Nothing is plainer than that, when a man is found here with property, our courts will inquire after the owner of it, equally whether such owner is alleged to be a foreigner or a citizen, present personally or absent. Nothing is plainer than that our courts will protect the rights of property, equally whether the property is in the owner’s grasp, or wrongfully found in the grasp of a felon. And no principle in the law of larceny is better established, as a general doctrine, than that any physical removal, however slight, of the entire physical substance of the thing alleged to be stolen, to which physical substance the remover has not the right of possession, even though he has it in custody, lawfully or unlawfully, is, where the felonious intent exists, larceny. If, therefore, the complete offense is not committed here, by one bringing here from a foreign country personal goods which he has there stolen, using them here as his own and meaning at the same time here to deprive the owner of his ownership therein, then it is impossible for any man, under any circumstances, to do acts completely falling within all the descriptions and definitions given in the books of this offense.

“When we turn to the authorities, we find that they have not always proceeded on the principles thus stated. In an old English case, where goods seized piratically on the ocean were carried by the thief into a county of England, the common law judges refused to take cognizance of the larceny, and remitted the matter to the Admiralty; ‘because,’ said they, ‘the original act, namely the taking of them, was not any offense whereof the common law taketh knowledge; and, by consequence, the bringing of them into a county could

State v. Newman.

not make the same felony punishable by our law.' *Butler's Case* cited 13 Co. 53; 3 Inst. 113. And the doctrine has been since applied, in England, both to goods stolen in other parts of the king's dominions (altered by Statutes 13 Geo. III. ch. 31, Sec. 4 and 7 and 8; Geo. IV. ch. 29, Sec. 76) and stolen in foreign countries. This doctrine has been followed by the courts of New York, Pennsylvania, North Carolina, Tennessee, Indiana, and Louisiana. It has been discarded and the opposite held in Connecticut, Vermont, Ohio, and Mississippi. In Massachusetts, the court discarded it also, holding defendants liable where the facts showed the original larceny to have been in another of the United States; but, in a late case, where it was in one of the British Provinces, the conviction was overthrown. *Com. v. Upsichord*, 3 Gray, 434. The rule which holds the criminal guilty in the state to which he brings his stolen goods has likewise been prescribed by statute in New York since the before mentioned adjudication was made; also in Alabama, Missouri, and some other states." 1 Bishop's *Crim. Law* (3d ed.,) Secs. 104-110.

Accepting, as is here done, the foregoing quotation as a correct exposition of the law, the first objection must fail.

The next objection is to the first instruction presented in the record, as follows: "Gentlemen of the jury, you are instructed that if you find from the evidence that the defendant was in possession of the cattle charged to have been stolen in the indictment, with a felonious intent to steal, take, and drive away the same, in the County of Lincoln, State of Nevada; and that, if you further believe from the evidence that the property belonged to the persons alleged in the indictment to be the owners thereof, and that the property was of the value of fifty dollars or more, then you will find the defendant guilty as charged in the indictment, though the original taking may have been in Utah Territory." This instruction was evidently drawn with reference

State v. Newman.

to the old doctrine before alluded to, as sustained in Connecticut and other states, and would probably have thereunder been good; but in view of the reason on which this decision stands, it is insufficient. Succinctly stated, it amounts to the proposition that A in possession of the property of B "with felonious intent to steal, take, and drive away the same," is guilty of larceny. This is not enough; as under the facts and law here, there is, and can be, no previous larceny, from which to deduce by mere possession of the stolen property, though coupled with felonious intent, a continuing one. A larceny under the circumstances of this case must be complete in itself, upon its own surroundings; there is no convenient legal fiction to help out the halting fact; and of course it is a self-evident proposition in the abstract that the mere possession of another's property, with intent to steal, is no larceny, until that intent is ripened into act; and so here, to repeat the author before quoted, "Where the first taking is abroad, no such inference can be drawn from the mere possession; while if inquiry establishes something done in this state, beyond merely having possession here, then the fact of there being in the possessor here no right to the possession, to the custody, or to any handling whatever of the property, added to proof of intent to appropriate it wrongfully here, with a knowledge of the ownership being in the other, establishes the complete offense." This instruction then was erroneous. There is nothing in the other objections; but upon this the judgment must be reversed and the cause remanded. It is so ordered.

State v. Hall.

THE STATE OF NEVADA, RESPONDENT, v. DAVID M.
HALL, APPELLANT.

MURDER—WHEN “THREATS” AVAILABLE IN DEFENSE. A person on trial for murder cannot avail himself of threats or menaces previously made against him by deceased, unless he at the time of the killing was actually assailed or had sufficient evidence to convince a reasonable person that he was in danger of incurring bodily injury or of losing his life at the hands of deceased.

ANTECEDENT THREATS ALONE DO NOT JUSTIFY HOMICIDE. In a murder case, where it appeared that threats to kill had been made by deceased against defendant some time before the homicide but that the fatal meeting with deceased had been sought by defendant for the avowed purpose of killing him, the court instructed the jury that all antecedent threats are dependent upon the facts at the time of the killing and in order to justify the homicide it must appear that at the time of the killing there was some action which would induce a reasonable man to believe that he was in danger of losing his life: *Held*, no error in instructing that there must have been some action on the part of deceased at the time of killing.

TIME FOR “IRRESISTIBLE PASSION” TO COOL. In a murder case, where the defense is justification on account of irresistible fear or passion caused by acts of deceased and without time to cool, the question for the jury to consider is whether there was time for a reasonable man to cool his passion or quiet his fears, not whether the one was cooled or the other quieted.

APPEAL from the District Court of the Fifth Judicial District, Nye County.

Defendant was indicted in August, 1873, for the murder of a person whose real name was unknown to the grand jury, alleged to have been committed on or about June 17, 1873, by shooting him with a pistol at Belmont. The main circumstances of the killing, as shown by the testimony, are stated in the opinion. It further appeared that the name of deceased was John Copeland, and that he was commonly known as “Black Jack.”

The trial, which took place in September, resulted in a conviction for murder in the first degree, and defendant was sentenced to be hanged on October 17, 1873. He appealed from the judgment.

State v. Hall.

P. H. Clayton, for Appellant.

I. The court erred in instructing the jury that there must have been some action on part of deceased at the time of the killing. 8 Kentucky, 487.

II. The statement of facts, as recited in the instruction [recited in the opinion,] would not justify a verdict of murder in the first degree. It is further objectionable, because it bears upon its face the impress of the opinion of the court as to the force and weight of testimony, and also because the latter part is without authority of law and calculated to confuse and mislead the jury. 25 Cal. 361; *State v. Millain*, 3 Nev. 409; *State v. Pierce*, 8 Nev. 291.

III. The court erred in refusing to give the instruction asked by defendant [recited in the opinion.] 1 Wharton Cr. Law, 990.

L. A. Buckner, Attorney General, for Respondent.

By the Court, WHITMAN, C J.:

Appellant stands convicted of murder in the first degree, and objects that the jury were misdirected in certain instructions given and by the refusal of one offered by him.

The first instruction to be reviewed is in the following language: "No threats or menaces, made by the deceased against the defendant D. M. Hall, can avail Hall, unless he at the time of the killing was actually assailed or had sufficient evidence to convince any reasonable person that he was in danger of incurring bodily injury, or of losing his life at the hands of the deceased. Whatever threats may have been made by deceased, they cannot be of avail to the defendant, unless at the time of the killing something was

State v. Hall.

done which would induce a reasonable man to suppose that he was in danger of great bodily harm, or of losing his life. All antecedent threats are dependent upon the facts at the time of the killing; and in order to justify the homicide, it must appear that at the time of the killing there was some action which would induce a reasonable man to believe that he was in danger of great bodily harm, or of losing his life."

There is no material conflict in the evidence, which tends to show that about one year before the homicide the deceased had at sundry times attacked appellant, and made threats to take his life, both in his presence and elsewhere; that of the threats made out of the hearing of appellant, he had been informed; that on the day of the killing appellant casually met the deceased as, in company with another person, appellant stopped for a moment at a store while driving past; that a short time after, he said to his companion, at the same time taking a pistol out of his pocket, that he had a mind to go back and kill that man. Nothing, however, was done; the parties accomplished the purpose of their drive, and in half an hour more or less appellant returned to the store of one Vollmer, when he said: "There is a man in town who threatened to kill me on sight; I don't think I will take the chances; I think I will go and kill him." Vollmer "told him not to do it; to let him alone; that the teams would go out in a short time again, perhaps day after to-morrow;" but appellant said "he would not take any chances, as the man was watching for him two or three times under oath to kill him." Appellant then walked to a neighboring store; shot and killed deceased, who at the time was helping to unload a wagon and who made no demonstration, whether hostile or otherwise, and uttered no word save, when appellant after the shooting said "You have threatened my life and are a damned thief" to say, "No, no, no."

The specification of objection to the instruction is, that the court "erred in instructing the jury that there must

State v. Hall.

have been some action on the part of the deceased at the time of the killing." The authority cited to sustain this objection really overturns it. " * * * The threats of even a desperate and lawless man do not and ought not to authorize the person threatened to take his life; nor does any demonstration of hostility short of a manifest attempt to commit a felony justify a measure so extreme. But when one's life has been repeatedly threatened by such an enemy, when an actual attempt has been made to assassinate him, and when after all this members of his family have been informed by his assailant that he is to be killed on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business or for any lawful or proper purpose; and if on such an occasion he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions and he does believe and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and abandon society to avoid such meeting." *Bohannon v. Commonwealth*, 8 Bush. (Ky.) 488-9. The instruction was given in view of the uncontradicted evidence, that the meeting was not casual but was sought by appellant for the avowed purpose of killing deceased. To declare the instruction erroneous in such view, would be to indorse the doctrine repudiated in the case quoted and to hold that the appellant might "hunt his enemy and shoot him down like a wild beast."

State v. Hall.

The following instruction is claimed to be erroneous on several grounds: 1st, that the statement of facts does not constitute murder in the first degree; 2d, that it indicates the opinion of the judge on the weight of the testimony; 3d, that the latter portion is calculated to mislead the jury. This is the instruction: "If the jury believe from the evidence that the defendant, D. M. Hall, on the day the homicide is alleged to have been committed in the indictment, rode out to East Belmont or to the mines with August Vollmer, about one hour before the homicide is alleged to have been committed in the indictment; and while on the way out to said mines, the defendant drew out his pistol or a pistol and said to August Vollmer, 'I have a notion to go back and kill the man alleged to have been killed in the indictment;' and that after the defendant having made such remark he, the said defendant, went out to the mines with said August Vollmer, and returned to the town of Belmont, Nye County, State of Nevada, with said August Vollmer; and that as soon as said defendant returned to said town of Belmont, he, said defendant, in front of Vollmer's store, said to Adolph Vollmer 'that there was a man in town who had threatened to kill him, Hall, and that he, Hall, would not take any chances, and that he, Hall, would go and kill him,' the man alleged to have been killed in the indictment, and that the defendant, Hall, did within two or three minutes thereafter kill the man alleged to have been killed in the indictment, at a time when the person alleged to have been killed in the indictment made no hostile demonstration toward the defendant, Hall; the jury are instructed to find the defendant guilty of murder; and if the jury believe that the defendant resolved to take the life of the person alleged to have been killed in the indictment before the fatal shot was fired, they are instructed to find the defendant guilty of murder in the first degree."

State v. Hall.

Upon inspection, and as before keeping in view the undisputed facts, no error appears. The same may be said with regard to the other instructions given and objected to, without detail of review.

The court refused this instruction offered by appellant: "If the jury believe the above defendant was assaulted in a violent and deadly manner by Jack Copeland or Black Jack a year or more anterior to the homicide; and that Jack Copeland made threats to take the life of the above defendant, and that the attacks or threats excited fear or passion in the above defendant, they are instructed that 'The law assigns no limits within which cooling time may be said to take place.'"

Waiving the point that the kind of fear or passion which will excuse a homicide is insufficiently stated and that the instruction is generally drawn with dangerous looseness, and to come to what was manifestly intended as its point, that is the last sentence; the giving without explanation would have been to mislead the jury. True, the law fixes no definite time as a general rule within which an irresistible passion may cool or a reasonable fear abate; that must depend upon the circumstances of each case. An hour has been held sufficient, also a portion of a day for passion to cool; and it is always held that, if there has been cooling time before a homicide, the killing is still murder, though in fact the passion has not cooled. "So, when anger provoked by a cause sufficient to mitigate an instantaneous homicide has been continued beyond the time, which in view of all the circumstances of the case may be deemed reasonable, the evidence is found of that depraved spirit in which malice resides." *State v. McCauts*, 1 Spears. 390. The question for the jury to consider was, whether there had been time for a reasonable man to cool his passion or to quiet his fears—not whether the one was cooled or the other quieted; as, says the author relied on by appellant, "However great the

Lamburth v. Dalton.

provocation may have been, if there be sufficient time for the passion to subside and for reason to interpose, the homicide will be murder. * * * The law assigns no limits within which cooling time may be said to take place. Every case must depend on its own circumstances; but the time in which an ordinary man in like circumstances would have cooled, may be said to be the reasonable time." 1 Wharton, 990.

To have given this instruction would have been error, as tending to distract the mind of the jury from the proper issue, by giving them an abstract fragment rather than the concrete whole, of the law upon the point involved.

The judgment is affirmed, and the district court directed to fix a day for carrying the sentence into execution.

THOMAS LAMBURTH, APPELLANT, v. PETER DALTON
et als., RESPONDENTS.

NEW TRIAL STATEMENT CANNOT BE CERTIFIED AFTER APPEAL. After a motion for a new trial on a statement, which is neither agreed to, allowed or certified, has been decided and an appeal taken, the court below has no authority to add a certificate; and a motion in the Supreme Court for leave to add such certificate will be denied.

APPEAL from the District Court of the Second Judicial District, Washoe County.

This was an action against Dalton as principal and A. A. Longley and John S. Bowker as sureties on the same injunction undertaking, which was the subject matter of complaint in the case of *Libby v. Dalton et als.*, ante 23. There was a verdict and judgment for plaintiff for damages in the sum of \$596 25 and costs. Defendants moved for a new trial, and

Lamburth v. Dalton.

the court below in response thereto made an order that a new trial should be granted, to take effect upon a certain day unless in the meanwhile the plaintiff would remit \$196 25 of the damages awarded. He declined to do so and appealed from the order.

It appears that in due time after the verdict and judgment in the court below, defendants filed and served a statement on motion for new trial, and plaintiff filed and served amendments. The defendants declined to accept the amendments and gave notice for settlement of the statement before the judge. The motion for settlement and motion for new trial were argued together and taken under advisement. Afterwards the judge corrected the statement and filed it with the clerk, together with his order granting a new trial; but he omitted to add his certificate of settlement to the statement. The statement as corrected and filed by the judge was inserted in the transcript on appeal, but without any certificate of agreement, allowance or settlement.

The respondents moved in this court to add the certificate of the judge below to the statement, as stated in the opinion.

Robert M. Clarke, for Appellant.

The court below erred in granting a new trial in the absence of an agreed, allowed or certified statement. *McWilliams v. Hirschman*, 5 Nev. 263; *White v. White*, 6 Nev. 20.

Haydon & Cain, for Respondents.

I. If it appears that defendants duly filed and served their statement and plaintiff filed and served amendments and that argument was had upon the hearing of the motion for settlement and new trial, it cannot be objected by plaintiff that the same does not appear to have been settled by

Lamburth v. Dalton.

the judge or the attorney in said cause. *Williams v. Gregory*, 9 Cal. 76; *Dickinson v. Van Dorn*, 9 Cal. 207; *Morris v. Angle*, 42 Cal. 239. And especially so when as in this case the judge in the order for a new trial refers to the statement on motion for new trial.

II. If the Court should hold that it will examine the record to see if there is or is not a certificate of settlement, it appears by the admission of appellant's counsel that there was a settlement in fact, but by neglect, inadvertence or mistake of the judge of the court, he failed to furnish the evidence of such settlement. The Practice Act, Sec. 68, authorizes the court to correct a mistake in any respect. The case being on appeal, this Court is the proper court to allow the correction of such mistake. *Sparrow & Trench v. Strong*, 2 Nev. 368; *Killip v. The Empire Mill Co.*, 2 Nev. 42; *State v. Pierce*, 8 Nev. 304; *Cooper v. Pacific Mutual Ins. Co.*, 7 Nev. 119.

III. The motion for new trial having been submitted at the same time with the motion to settle statement (both being reserved by the judge after full argument by counsel,) no substantial right of appellant is affected; hence the defect should be disregarded. Practice Act, Sec. 71; *McManus v. Ophir S. M. Co.*, 4 Nev. 18.

By the Court, HAWLEY, J.:

This appeal is from an order of the district court granting a new trial. At the time the order was made the court did not have before it an agreed, allowed, or certified statement on motion for a new trial, as required by Section 1258, Compiled Laws, p. 347.

On the day this appeal was set for hearing respondent's attorneys moved this Court for leave to add to the statement a certificate of the judge allowing the statement, made

Treadway v. Wilder.

after the new trial was granted and after the transcript on appeal had been filed in this Court. It was held in *Caples v. Central Pacific R. R. Co.*, 6 Nev. 272, that such a practice was not permissible.

This Court having acquired jurisdiction of the case, the court below had no authority, while the appeal was pending, to give such certificate.

The order granting a new trial is reversed.

AARON D. TREADWAY, RESPONDENT, v. JONAS WILDER, APPELLANT.

WEIGHT OF EVIDENCE ON MOTION FOR NEW TRIAL AND ON APPEAL. A *rist prius* court ought not to grant a new trial, where there is conflicting evidence, except the weight of evidence clearly preponderates against the verdict; but when such court does grant a new trial, the appellate court will not interfere unless the weight of evidence clearly preponderates against the ruling of the court.

DEED OF TRUSTEE UNDER CONGRESSIONAL TOWN-SITE ACT NOT CONCLUSIVE. A deed given by a trustee under the congressional town-site act (5 U. S. Stats. 567) is not conclusive; if the grantee was not in occupancy or entitled to occupancy of the land the trustee could have no authority to execute such deed, and it may be collaterally attacked as void and of no effect.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This action was before the court on a previous appeal at the July term, 1872; and will be found reported in 8 Nev. 91. The cause was upon that occasion remanded for a new trial, which took place in the court below in March, 1873, and resulted in a verdict for defendant. Plaintiff moved for a new trial mainly upon the ground of insufficiency of the

Chief Justice

Treadway v. Wilder.

evidence to sustain the verdict and judgment; and such motion was granted. This appeal is from the order.

T. W. W. Davies, for Appellant.

I. There was the amplest evidence to warrant the verdict of the jury; and the court, in setting aside the verdict, exercised no just or legal discretion. Though the testimony of plaintiff and defendant was in flat contradiction, there were many other facts presented to the jury sustaining the defendant.

II. The act of Congress under which the deed of the trustee, S. H. Wright, to plaintiff purports to derive its efficacy, provides that the entry of town-sites shall be "in trust for the several use and benefit of the *occupants* thereof according to their respective interests." The law recognizes no other proprietors except actual occupants, and the land department will not protect the claims or interests of any other persons. 1 Lester's L. L. 436, 441, 737; 2 Lester's L. L., 312. The deed of Wright to Treadway not having been obtained in conformity with law, was void. 5 U. S. Stats. 567.

III. In ejectment the plaintiff recovers by the strength of his own title. The plaintiff here had the closing of the cause; the court of its own motion instructed the jury; the whole matter was argued and presented at length; and we submit that the setting aside of the verdict was unauthorized and unwarranted.

Ellis & King, for Respondent.

I. Appellant seems to claim that if the evidence adduced upon the trial below would sustain the verdict, this Court is concluded thereby and must reverse the order appealed from, as an abuse of discretion. Such is not the law. The

Treadway v. Wilder.

question before this Court is whether the evidence presented in the record is sufficient to sustain the order granting the new trial or not, and not whether there is such a conflict of testimony as would sustain an order refusing a new trial, if the discretion of the court had been so exercised. The order for a new trial comes to this Court as a new verdict, with all the sanctity and even more of a presumption in its favor than that which supports the verdict of a jury where there is a substantial conflict of testimony. See *Phillips v. Blasdel*, 8 Nev. 61; 21 Cal. 414; 21 Iowa, 337.

II. Defendant cannot attack the deed from Wright to Treadway in this collateral proceeding, but is remitted to his remedy directly against the deed, as there is no pretense that we ought to be held a trustee. Where is the difference in principle between the case at bar and the familiar cases where it has been held that a patent obtained from the United States by a party not entitled to it cannot be attacked in a collateral proceeding? In this case the deed from Wright to Treadway constitutes a patent from the United States to Treadway, and operates in the same manner and can only be assailed in a case where a patent could be attacked.

By the Court, HAWLEY, J.:

This is an action of ejectment to recover possession of "about four acres of land," a portion of which is situate without, and a portion within the city limits of Carson. Plaintiff, as to the land without the city limits, relies upon a patent from the U. S. government (for forty acres of land,) and for the other portion rests his claim under a deed executed by Judge S. H. Wright, acting as trustee under a statute of this State. Stats. 1866, 54. Defendant claims that he was in the actual possession of all the land in controversy at the time plaintiff made application for said patent

Treadway v. Wilder.

and for said deed, and bases his right to recover that portion outside the city limits upon an alleged verbal contract set out in his amended answer. To the other portion defendant claims that plaintiff was not an actual occupant of the land, and was not entitled under the law of congress, or the statute of this State, to receive any deed from the trustee, and that said deed was therefore "void and of none effect."

The testimony submitted at the trial in relation to the verbal contract was conflicting. The defendant swore positively to the agreement, and plaintiff, equally as positive, denied that any agreement was ever made. The testimony as to the possession of the land within the city limits was equally as conflicting, each party testifying positively that he was the actual occupant thereof. Testimony was introduced which tended to corroborate the statements made respectively by plaintiff and defendant. The jury found a verdict for defendant. The court, on motion of plaintiff, set the verdict aside on the ground of "insufficiency of the evidence," and granted a new trial. From this order defendant appeals.

Did the court abuse its discretion in granting a new trial? It must be borne in mind that the *nisi prius* courts in reviewing the verdict of juries are not subject to the rules that govern appellate courts. They may weigh the evidence, and if they think injustice has been done grant a new trial where appellate courts should not or could not interfere. The question under consideration has been so often presented that opinions have become stereotyped. Nothing need be added to or taken from the rule, so well established, often declared and always followed. "The court below ought not to grant a new trial when there is conflicting evidence, except the weight of evidence clearly preponderates against the verdict." But when the court grants a new trial, "the appellate court will not interfere unless the weight of evidence clearly preponderates against the ruling of the court."

Ex parte Winston.

The establishment of this rule is one of the necessary results which flow from the well known superior advantages of the court below to determine the credibility of witnesses. The questions to be decided are purely questions of fact which are peculiarly within the province of a jury and the court below to determine; and as the weight of evidence materially depends upon the character and credibility of the witnesses, we cannot, after a careful examination and comparison of all the testimony, say that the court abused its discretion, and shall not therefore interfere with its ruling.

It is claimed by plaintiff that the deed obtained from Wright, trustee, is conclusive; that it cannot be attacked except in a direct proceeding to have it set aside. We do not think this position can be maintained upon reason or authority. If plaintiff was not an actual occupant or entitled to the occupancy of the land, he was not under the law of congress or of this State entitled to the deed, and the trustee had no authority to execute it. Upon this point we adopt the views expressed by Justice WHITMAN, in *Treadway v. Wilder*, 8 Nev. 98, 99.

To have the effect to annul the deed the testimony should be positive and decisive. If there is a substantial conflict of evidence, the deed should stand.

The order appealed from is affirmed.

EX PARTE T. B. WINSTON.

HABEAS CORPUS—COMMITMENT BY JUSTICE OF THE PEACE. A person held in custody under a regular commitment of a justice of the peace will not be discharged on habeas corpus, unless it appears that the jurisdiction of the justice has been exceeded or that the commitment issued without authority of any judgment, order or decree of any court or any provision of law.

JURISDICTION ON HABEAS CORPUS NOT APPELLATE. A habeas corpus is not writ of error, nor can it be used to authorize the exercise of appellate jurisdiction.

Ex parte Winston.

WHAT WILL BE LOOKED INTO ON HABEAS CORPUS. On habeas corpus, in case of a commitment under the judgment of a court such judgment cannot be disregarded; nor will the record be looked into except to ascertain whether a judgment exists, without regard to the question whether it be right or wrong.

VIOLATION OF "LORD'S DAY" ACT OF 1861—QUESTION ON HABEAS CORPUS.

Where a person held in custody under a commitment by a justice of the peace for violation of the act of November 21, 1861, by gaming on Sunday (Stats. 1861, 39,) sued out a habeas corpus and claimed his discharge on the ground that the act of 1861 was virtually repealed by the act of 1869 to restrict gaming (Stats. 1869, 119): *Held*, that the justice had jurisdiction to determine the question raised; that his judgment, though it might be erroneous, was not void, and that such judgment could not be reviewed on habeas corpus.

HABEAS CORPUS before the Supreme Court. The petitioner set forth that he was unlawfully restrained of his liberty by Sheriff Swift at the county jail in Carson City, Ormsby County; that he had been arrested under the alleged provisions of the act of the Territorial legislature entitled "An act for the better observance of the Lord's day," approved November 21, 1861, upon a charge of dealing the game of faro for gain upon the first day of the week; that he had procured a license to deal the game of faro under the provisions of "An act to restrict gaming," passed March 4, 1869; that, notwithstanding such license, he had been adjudged guilty by a justice of the peace of the charge made against him, fined \$50 and committed to jail; and that such judgment and the commitment were illegal and void for want of jurisdiction in the justice, on the ground that the act of 1861 had been repealed by the act of 1869.

Ellis & King, for Petitioner.

I. If, as we claim, the law of 1869 repealed that of 1861, the want of jurisdiction in the court below must be confessed. If so, this Court is not called upon to review an erroneous

Ex parte Winston.

judgment, but to decide whether there is any judgment upon which the petitioner can be held. Hurd on Habeas Corpus, 376-377, and cases cited.

II. The suggestion that the question as to whether the law of 1869 repealed that of 1861 or not, was a proper question to have been submitted to the justice's court (the decision of which question is decisive of the question of its jurisdiction) only affirms the unquestioned principle, that the first question decided in every case is one of jurisdiction; and this is so whether it appears affirmatively upon the record or is only implied; for that question is always and necessarily raised and must be decided. This Court is not concluded by the judgment of the justice affirming his own jurisdiction; for if so, no person can ever be discharged from imprisonment upon this writ who is held by color or pretense of a judgment.

III. The law of 1861 inhibited the act complained of during certain periods or divisions of time. The law of 1869 licenses and permits the very same acts during the periods before inhibited, by permitting them during the quarter year designated in the license, which necessarily includes the periods during which they are inhibited by the act of 1861. The law of 1861 is the only act authorizing or empowering criminal prosecutions for gaming, and is the law upon which this prosecution was based; while the law of 1869 protects the licensee from any criminal prosecution whatever for the act complained of. *Columbian Co. v. Vanderpool*, 4 Cow. 556; *Livingston v. Harris*, 11 Wend. 329; 3 Paige, 528; *Harri-
ngton v. Trustees Rochester*, 10 Wend. 547.

By the Court, HAWLEY, J.:

The petitioner is held in custody by the sheriff of Ormsby County by virtue of a commitment issued from the justice's court of Carson Township, which recites that petitioner had

Ex parte Winston.

been found "guilty of the offense of playing at a game of chance for gain on the first day of the week, commonly called Lord's day;" that petitioner was "fined in the sum of fifty dollars * * * and in default of payment thereof, that he be confined in the county jail," etc., etc. The commitment is in proper form, and regular upon its face.

Petitioner claims that the court had no jurisdiction because no public offense is "specified in the commitment." This position is sought to be maintained upon the theory that section 3 of "An act to restrict gaming," passed March 4, 1869 (Stats. of 1869, 119,) virtually repeals the law of 1861 (Stats. of 1861, 39,) for an alleged violation of which the petitioner was tried, found guilty and sentenced; and we are asked in this proceeding to decide that question.

At the threshold of the argument we called the attention of counsel to what we considered an insuperable objection to any examination upon the point whether or not the law of 1861 had been repealed, by stating that we did not think the question was properly before us, it appearing upon the face of the commitment that the justice's court had jurisdiction of the subject matter and of the person of petitioner; and requested authorities, if any could be found, where courts or judges had under a writ of habeas corpus gone behind a judgment or commitment of a court of competent jurisdiction to determine whether or not its proceedings were illegal or erroneous. The statute provides that it shall be the duty of the judge before whom the writ is returnable, after a hearing, to remand the petitioner "if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree, or in cases of contempt of court." Stats. of 1862, 100, Sec. 19. We are not authorized to discharge petitioner unless the jurisdiction of the justice's court has been exceeded or the commitment has been issued without authority of any judg-

Ex parte Winston.

ment, order or decree of any court, or any provision of law. Stats. of 1862, 100, Sec. 20; 1 Kent's Com. 647.

Chancellor Kent says that "no inquiry is to be made into the legality of any process, judgment or decree * * * where the party is detained under the final decree or judgment of a competent court." In *Commonwealth v. Lecky*, Gibson, C. J., said: "The habeas corpus is undoubtedly an immediate remedy for every illegal imprisonment. But no imprisonment is illegal where the process is a justification of the officer; and process, whether by writ or warrant, is legal wherever it is not defective in the frame of it, and has issued in the ordinary course of justice from a court or magistrate having jurisdiction of the subject matter." 1 Watts, 67, and authorities there cited.

A habeas corpus is not a writ of error. It cannot be used to authorize the exercise of appellate jurisdiction. On a habeas corpus the judgment of an inferior court cannot be disregarded. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until reversed; and when the imprisonment is under process, valid on its face, it will be deemed prima facie legal, and if the petitioner fails to show a want of jurisdiction in the magistrate or court whence it emanated, his body must be remanded to custody. *People v. Cavanaugh*, 2 Parker Crim. R. 658; *People v. McCormack*, 4 Parker Crim. R. 18; *People v. Casels*, 5 Hill, 167; *Passmore Williamson's Case*, 26 Penn. State, 17; *Ex parte Toney*, 11 Mo. 662; *In re John O'Connor*, 6 Wis. 290; *Platt v. Harrison*, 7 Iowa, 80; *Ex parte Tobias Watkins*, 3 Pet. 193; *In re Theophilus C. Callicot*, 8 Blatchford Circuit Court R. 89; *Ex parte McCullough*, 35 Cal. 100; *Ex parte Murray*, 43 Cal. 457.

In *Ex parte Watkins*, petitioner was detained in prison by virtue of a judgment of the circuit court of the United States rendered in a criminal prosecution carried on in that

Ex parte Winston.

court. A copy of the indictment and judgment was annexed to the petition. The motion for discharge was founded on the allegation that the indictment charged no offense for which the prisoner was punishable in that court, or of which that court could take cognizance; and it was consequently claimed that the proceedings were *coram non judice*, and void. Marshall, C. J., in delivering the opinion of the court said, "Can the court, upon this writ, look beyond the judgment, and reexamine the charges on which it was rendered. A judgment, in its nature, concludes the subject on which it is rendered and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this Court would be. It is as conclusive on this Court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it. The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced; but they deny their application to a case in which the indictment charges an offense not punishable criminally according to the law of the land. But with what propriety can this Court look into the indictment? We have no power to examine the proceedings on a writ of error; and it would be strange, if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court * * is a court of record, having jurisdiction over criminal cases. * * * If the offense be punishable by law, that court is competent to inflict the punishment. * * * To determine whether the offense charged in the indictment be legally punishable or not, is

Ex parte Winston.

among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case as in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it." After reviewing numerous authorities the opinion concludes as follows: "Without looking into the indictments under which the prosecution against the petitioner was conducted, we are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of habeas corpus ought not to be awarded."

In Callicot's case the petition alleged that petitioner was imprisoned under or by color of a sentence of the circuit court of the United States, and it was charged that such imprisonment was illegal "for the reason that the law under which such sentence was imposed had been changed and repealed before said sentence was passed." The court, upon the authority of *Ex parte Watkins*, refused to examine the question. "I find no case," said Woodruff, J., "in which the supreme court have held any other doctrine, and no case is cited to me in which that court or any court of the United States has countenanced the idea that a judge can, under or by virtue of the writ of habeas corpus, practically reverse a judgment of the circuit court for error and discharge a prisoner from its sentence."

In *Platt v. Harrison*, the petitioner was convicted before a police magistrate of the offense of selling goods, etc., without a license, under and by virtue of a city ordinance, which he claimed the city council had no power or authority to pass. The supreme court refused to examine the question whether or not the city council had any authority to pass the ordinance. Wright, C. J., said: "The police magistrate is conservator of the peace; is invested with exclusive original jurisdiction for the violation of the city ordinances;

Ex parte Winston.

and with criminal and civil jurisdiction limited to said city. From his decisions appeals are allowed to the district court of the county * * in the same manner as appeals from the judgments and decisions of a justice of the peace. * * But the argument is, that the ordinance was passed without authority of law and was null and void. Whether it was or not was a legitimate subject of inquiry by the magistrate, in the same manner as any other question which might be presented for his adjudication. And being determined by him adverse to the position of the prisoner, his remedy was by appeal or writ of error and not by habeas corpus. It is not a case where a court has acted without having jurisdiction. On the contrary, the most that can be claimed is that the magistrate *erred* in deciding that the ordinance was in force and that the city had the power and authority to provide for the punishment of the offense."

In the case under consideration the justice of the peace has not exceeded his jurisdiction. By the express provisions of the statute (Stats. 1861, 39,) the justice of the peace has original jurisdiction of the subject matter. It was his duty to decide whether or not the law of 1861 had been repealed by implication or otherwise. In no other way could the question be raised. Such was the subject matter with which he had to deal. That he had jurisdiction to determine this question cannot be denied. Such being the fact, his judgment may be erroneous but it cannot be void. If the justice erred, petitioner has his remedy by appeal to the district court. The judgment of the justice is conclusive until reversed. It cannot be reviewed upon habeas corpus.

The writ must be dismissed. It is so ordered.

WHITMAN, C. J., did not participate in the foregoing decision.

State v. Central Pacific R. R. Co.

THE STATE OF NEVADA, APPELLANT, v. THE CENTRAL PACIFIC RAILROAD COMPANY, RESPONDENT.

TAX SUIT—EVASIVE ANSWER OF PAYMENT. In a suit to recover a certain amount of delinquent taxes, where defendant pleaded that he had paid plaintiff a certain less sum and that plaintiff had accepted and received the same in full satisfaction and discharge: *Held*, that the pleading did not amount to an answer that the taxes had been paid or constitute a defense to the action.

TAXES—RECEIPT FOR LESS AMOUNT NOT EVIDENCE OF PAYMENT IN FULL. Where a corporation owing a certain amount of taxes for three years entered into a compromise with the board of county commissioners, whereby it paid a certain less amount and received a receipt purporting to be in full for all the taxes: *Held*, that such receipt was not evidence of payment in full for the tax of any one year.

COUNTY COMMISSIONERS CANNOT COMPROMISE TAX SUITS. The board of county commissioners have no power to compromise and settle suits instituted by the State for the collection of delinquent taxes.

POWERS OF COUNTY COMMISSIONERS SPECIAL AND LIMITED. Boards of county commissioners are inferior tribunals of special and limited jurisdiction, and their action must affirmatively appear to be in conformity with some provision of law giving them power or it will be without authority.

POWER TO REDUCE TAXES. The only authority giving county commissioners power to reduce or in any manner change taxes as assessed is vested in them as boards of equalization; and when acting in that capacity they must comply literally with the plain provisions of the statute.

COUNTY COMMISSIONERS CANNOT RELEASE LIEN OF TAXES. When taxes are levied they become a lien, and when the board of equalization has acted an obligation immediately arises on the part of the party taxed to pay the State the amount due; and thereafter county commissioners can neither release the property from the lien nor discharge the party from his obligation.

APPEAL from the District Court of the Second Judicial District, Washoe County.

It appears that the aggregate amount of taxes assessed against the Central Pacific Railroad Company in Washoe County for the years 1869, 1870 and 1871 was over \$74,000,

State v. Central Pacific R. R. Co.

of which \$18,042 75 was for the year 1869. On February 5, 1870, suit was commenced to recover the taxes for that year—being this present action. On December 11, 1871, this suit being then pending and the taxes for 1870 and 1871 also delinquent, the supposed agreement or compromise between the company and the county commissioners, recited in the opinion, was entered into; whereby the company paid \$22,355 and received a receipt purporting to be in full, and this action was directed to be dismissed.

There having been a judgment for defendant in the court below, plaintiff moved for a new trial. This appeal is from the order denying the motion and from the judgment.

R. M. Clarke, for Appellant.

I. A board of county commissioners has no authority by the law to compromise suits for the recovery of State and county taxes; nor to accept, nor to direct the treasurer to accept, a less sum than is due. Such a board is a creation of the statute, of special and limited jurisdiction and authority, with no power except such as is specially conferred. The legislature has not clothed it with the extraordinary power exercised in this case. Whatever authority it may possess respecting suits "to which the county is a party," it certainly possesses none respecting suits to which the State is a party.

Respecting the State's portion of the taxes levied, the board of county commissioners has nothing whatever to do except when sitting as a board of equalization, and then only to equalize assessments upon formal complaint and sufficient notice. To hold the commissioners clothed with authority to control and dismiss suits for the collection of taxes, is to surrender into their hands the absolute and irresponsible power to destroy the revenues of the State. There is no appeal from their action; and if we concede their jurisdiction, there is no remedy for their abuses.

State v. Central Pacific R. R. Co.

II. The answer, which was made in the case at bar, could and can be made as well and truthfully in the actions to enforce payment of the taxes for the years 1870, and 1871; and the proofs which support the conclusions reached in this case would warrant similar conclusions in those cases. To affirm, therefore, the order of the court denying plaintiff's application for a new trial would be to hold legal and valid the action of the commissioners in compromising the State's demand for taxes by receiving \$20,000 in settlement of \$74,000.

L. A. Buckner, Attorney-General, also for Appellant.

I. After the board of equalization acted and did not reduce the valuation, the liability of defendant for the assessed value was fixed. (*State v. Western Union Telegraph Co.*, 4 Nev. 345,) and could only be discharged by the payment of the money. Stats. 1861, 273, Sec. 3. The tax levied becomes a lien by the above cited section, and cannot be discharged until all the taxes are paid.

II. In tax suits no other answer will be permitted except those specified in the revenue law. Stats. 1864-5, 287, Sec. 32. Such an answer as that called "Supplementary Answer No. 3" is not permitted by the section named.

III. Payment after the day cannot be made with a less sum than the full amount due; nor is such payment good as accord and satisfaction. It cannot be pleaded as either. *Cumber v. Wane*, 1 Smith's Leading Cases, 560, where a number of cases are cited; *Dederick v. Leman*, 9 Johns. 333; *Harrison v. Wilcox*, 2 Johns. 448.

T. B. McFurland, for Respondent.

I. The money for which this suit was brought had at the time of the trial been fully and entirely paid—every dollar

and every cent of it. The action was to recover \$18,042 75 for taxes due for the year 1869. Defendant paid the sum of \$22,355 in satisfaction of the claim sued for—being \$4,312 25 more than the amount prayed for in the complaint. The amount paid was also intended to settle other demands in addition to the one sued for. Whether it did in fact settle such other demands in whole or only in part is a question not involved in this case. Those other demands were for the taxes of 1870 and 1871. When suits are brought to recover those taxes it will be time enough to inquire whether they have been paid, and whether the board of commissioners had power to make the order settling them.

II. Defendant expressly applied the payment to the satisfaction of the claim sued for. It was an express condition of the payment that it should satisfy that claim and that this suit should be dismissed. Plaintiff, through the district attorney and the commissioners, also applied the payment in the same way; and if neither party had made any application, the law would apply the money to the debt which was first or oldest in point of time. Story on Contracts, Sec. 878.

III. The defendant settled this suit with the plaintiff through agents who had the power to appear for and bind the plaintiff. The statute expressly gives to county commissioners power to “control the prosecution or defense of all suits to which the county is a party.” Stats. 1864-5, 259, Sec. 8, sub. 12. This provision evidently refers to all cases where the county is actually a real party in interest, and includes all such cases, although some statutory provision may require them to be brought in some particular form by which the county does not appear as a nominal party. In this case, for instance, the county is no less a party within the meaning of the law than if the statute had required its name to be used as a plaintiff.

State v. Central Pacific R. R. Co.

IV. If the county commissioners have not power to settle or acknowledge satisfaction of such an action, who has? Can it be contended that there can be power to commence an action and no power anywhere on the part of the plaintiff to end it—to dismiss it or to acknowledge satisfaction when the demand is paid? Neither the attorney general nor any State officer has any authority in the premises. If the commissioners have not such power, then there is only one other person who with any plausibility can be asserted to possess it. That person is the district attorney. If he be the person clothed with this authority, then we have only to point to the fact clearly established by the evidence and admitted by the plaintiff that the district attorney was a party to the settlement.

V. The technical point that payment is not sufficiently pleaded in the answer we do not deem of sufficient importance to require discussion. The answer states the facts constituting the defense; and under our system that is just what is required. Defendant pleaded payment in the answer and proved it by the evidence. That makes a plain, simple and complete defense, and leaves no room for doubt on the part of the court or for argument on the part of counsel.

By the Court, HAWLEY, J.:

This is an action to recover the sum of \$18,042 75 alleged to be due plaintiff for the delinquent taxes for the year 1869, on the property of defendant situate in Washoe County.

Before the trial defendant made a compromise or settlement with the board of county commissioners evidenced by an order of the board, as follows; "Whereas a controversy has heretofore existed and still exists—between the Central Pacific Railroad Company on the one hand and the State of Nevada and County of Washoe on the other hand,

State v. Central Pacific R. R. Co.

in relation to certain taxes levied against the property of said railroad company situated in the said county for the three years 1869, '70 and '71 ; and much fruitless litigation has already been had on the part of said State and county in endeavoring to collect said taxes, and still more litigation must be had for that purpose, of the success of which grave doubts are entertained. And whereas, said railroad company have proposed a settlement of all pending and anticipated controversies in relation to said taxes and to that end have agreed to pay into the treasury of said county and have already done so, the sum of \$20,000, together with the further sum of \$2000 for the payment of certain costs having accrued, from said litigation, and the further sum of \$355 school tax due School District No. 11, Washoe County, upon special assessment therefor, in full satisfaction of all taxes assessed against them for property situated in said county, for the three and each of the three years aforesaid. And whereas this board, having considered and being fully advised in the premises, are of the opinion that the settlement so as aforesaid proposed is to the advantage and benefit of said State and county.

“Now, therefore, it is ordered that said sum of \$20,000, and said sum of \$2000, and the further sum of \$355, be and the same is, received in full satisfaction for all taxes which have been levied upon the property of said railroad company situated in this county for the three years, 1869, 1870 and 1871, and the said railroad company be and they hereby are released from all liability for said taxes or any part thereof. And it is further ordered that the treasurer of said county do give to said railroad company a receipt in full for all of said taxes, for each of said years, and that the district attorney of said county do dismiss and discontinue all suits and proceedings now pending against said company for the recovery of said taxes or any part thereof, at the cost of this county, and that he be and hereby is instructed

State v. Central Pacific R. R. Co.

not to institute any further actions or proceedings * * * for the recovery of said taxes or any part thereof."

The district attorney refused to dismiss the suit, whereupon defendant, by leave of the court, filed "supplemental answer No. 3," alleging—First, "That since the commencement of this action, and since the filing of its answers herein, said defendant has paid to said plaintiff the sum of \$22,355, and the said plaintiff has accepted and received the same, in full satisfaction and discharge of the taxes or moneys sued for in said action, and of all damages by said plaintiff sustained by reason of the non-payment thereof, as alleged in said complaint." Second, "That since the commencement of said action, * * * said defendant has paid to said plaintiff the sum of \$22,355, on account of the taxes or moneys mentioned in said complaint."

Plaintiff moved the court to strike out this answer upon the grounds that "said answer is sham and irrelevant in this: that it insufficiently attempts to plead accord and satisfaction, * * *; and in this: that it insufficiently attempts to plead payment of the taxes, * * * ." But it nowhere appears from the record before us that any action was had thereon. Plaintiff also interposed a demurrer, based substantially upon the same grounds as embodied in the motion to dismiss, which was overruled by the court. The cause was then tried before the court without a jury.

The only evidence offered to sustain the averments of defendant in supplemental answer No. 3, was the order of the board of county commissioners, and the testimony of D. H. Haskell. This witness testified "that in pursuance of the settlement he paid to the county treasurer of said county for the defendant and as its agent in that behalf the full sum of \$22,355 00, gold coin of the United States; that he was agent for defendant in making the said settlement and paying said money; that said money was paid upon the express condition that the claims and demands sued for in this pres-

State v. Central Pacific R. R. Co.

ent action should be fully satisfied and settled thereby, and that this action should be immediately dismissed; that the board of county commissioners and the district attorney both agreed to dismiss said action and that said claims and demands should be considered satisfied in full, and that without said agreement and understanding, no part of said money would have been paid by defendant. Defendant at the time of the payment of said money received from the county treasurer of said Washoe County a receipt in full for all the taxes sued for in this action."

From this evidence the court found its conclusions of law as follows: "It is unnecessary to pass upon the question argued by counsel, whether or not the board of commissioners had the power to make the agreement with defendant above set forth. The amount paid by defendant is largely in excess of the demands of the complaint. Defendant had the right to apply it to the satisfaction of said demands and did so apply it. If defendant had not done so, the law would make the application to the oldest claim, which in this case is the one sued on. It is not necessary therefore to determine whether the money paid also satisfied the taxes of 1870 and 1871. I find that there has been full payment by defendant of all the demands of the complaint in this case, and that judgment should be rendered dismissing the action with costs to defendant."

From an order overruling plaintiff's motion for a new trial, this appeal is taken. It is claimed by defendant's counsel that payment is sufficiently plead and that the evidence shows conclusively a payment in full of the tax of 1869. It is likewise contended that the validity of the so-called compromise cannot be considered in this action, nor the question be raised except in suits brought to recover the taxes assessed against defendant for the years 1870 or 1871.

1. Are the averments in the answer sufficient to constitute the defense of payment? One of the objects of a plead-

ing is to require certainty ; each party should without equivocation, state the facts upon which it relies. To use the language of our statute, the pleading should contain "a statement of the facts constituting the cause of action (or defense) in ordinary and concise language." This is absolutely necessary in order to bring the respective litigants to an issue upon the facts really controverted. The defendant has, in our judgment, evaded any statement of facts constituting the defense of payment. The statute clearly defines the several defenses that may be interposed in suits brought to enforce the collection of taxes. "The defendant may answer * * * Second, that the taxes with costs have been paid since suit." (Compiled Laws, 3156.) There is no ambiguity in this language. The pleading tested by demurrer should substantially, if not strictly, conform to this plain provision of the statute. The averment is that "defendant has paid to said plaintiff the sum of \$22,355 00 and * * said plaintiff has accepted and received the same in full satisfaction and discharge." But the statute requires the defendant to answer "that the taxes with costs have been paid," not a certain sum of money in "satisfaction and discharge," or, "on account of the taxes * * mentioned in said complaint." The averments do not substantially comply with the provisions of the statute and are not sufficient to constitute the defense of payment.

It is evident to our mind that the defendant designedly avoided using the language of the statute. The averments contained in supplemental answer No. 3 could be interposed in precisely the same language in defense to any suit that might be brought to enforce the collection of taxes due for the years 1870 and 1871. If the defendant considered that the transaction amounted to a payment of the tax of 1869, it should have so declared in plain, unequivocal language. It would be bound by its pleading, not by the brief of its counsel.

But it is conclusively established by the evidence that the transaction was one of an attempted compromise. The money was paid with the express understanding that it was to be "in full satisfaction for all taxes * * * for the three years, 1869, 1870 and 1871" And on account of said payment the commissioners agreed, not only to release defendant for the taxes of 1869, but "from all liability for the taxes of 1869, 1870 and 1871" The treasurer was directed to give to defendant—not a receipt for the taxes of 1869, but "a receipt in full for all of said taxes for each of said years," and the district attorney was not only required to "dismiss and discontinue all suits and proceedings now pending," but was instructed "not to institute any further actions or proceedings * * * for the recovery of said taxes, or any part thereof." This is the truth of the transaction. If this evidence amounted to a payment in full of the tax of 1869, it follows that the same evidence would be sufficient to justify a court in finding the absurdity that it also amounted to a payment in full for the taxes of 1870 and 1871. The bare statement of this fact carries with it the conviction that defendant's claim of payment is false.

We cannot evade the question whether the compromise was valid or void. It is upon that issue alone that the order of the court granting a new trial must be upheld or reversed, for "the evidence," as stated by plaintiff in its specification of errors, "without conflict or contradiction shows that the sum of money—to wit, \$22,355—which was paid by the defendant to the county treasurer of Washoe County was not in payment of the tax and delinquency due for the year 1869, but in satisfaction and compromise of the taxes of the defendant for the years 1869, 1870 and 1871."

2. Did the board of county commissioners have any authority to make the compromise with defendant? It is not claimed that there is any law expressly giving to the commissioners power to compromise and settle suits instituted by the State

for the collection of delinquent taxes. But it is argued by defendant's counsel that section 8, subdivision 12, of the Statutes of 1864-5, p. 259, giving to the commissioners power to "control the prosecution or defense of all suits to which the county is a party;" and sec. 29 of the Statutes of 1871, p. 94, providing that "no suit for the collection of delinquent taxes shall be commenced except by the direction of said board," imply that it was the intention of the legislature to invest the commissioners with full power to control the collection of taxes, and "that when the process of collection has taken the form * * * of an action at law, the county commissioners have control of such action." This position is wholly untenable.

The board of county commissioners is an inferior tribunal of special and limited jurisdiction. It must affirmatively appear that the action of the board in compromising with defendant was in conformity to some provision of the statute giving to it that power, else its order was without authority of law and void. *State v. Commissioners of Washoe County*, 5 Nev. 319; *Swift v. Commissioners of Ormsby County*, 6 Nev. 97; *Hess v. Commissioners of Washoe County*, 6 Nev. 108; *White v. Conover*, 5 Blackford, 463; *Rosenthal v. M. & I. Plankroad Company*, 10 Ind. 361; *City of Lowell v. Commissioners of Middlesex*, 3 Allen, 550; *Finch v. Tehama County*, 29 Cal. 455.

The only authority giving to the commissioners any power to reduce or in any manner change the taxes as assessed is vested in them as a board of equalization, and while acting in that capacity it was held in the *State of Nevada v. The Board of County Commissioners of Washoe County* that they must literally comply with the plain provisions of the statute.

The statute of Massachusetts provides that in certain cases the commissioners "shall make such an abatement of * taxes as they shall deem reasonable." In *City of Lowell v.*

State v. Central Pacific R. R. Co.

Commissioners, etc., the commissioners had allowed interest on the amount agreed upon to be abated, the said sum having been paid under protest. Upon a writ of *certiorari*, the supreme court held that the "the county commissioners, in exercising the power conferred on them by which they are authorized to abate taxes, act as a tribunal of special and limited jurisdiction. They can render no judgment and make no order except such as comes within the scope of the authority conferred on them by statute. There is no provision of law which gives to a party whose tax is abated a right to recover interest on the sum which he receives back from the town or city in consequence of such abatement. Although it may be just and reasonable that such a recovery should be allowed, the commissioners have no power to order it, in the absence of any express enactment authorizing it. They are not constituted a tribunal with authority to adjust equities between parties arising out of the abatement of taxes."

By the provisions of section 3 of the revenue act (Compiled Laws, 3127,) the tax when levied became a lien against the property of defendant. After the commissioners had acted as a board of equalization, an obligation immediately arose on the part of defendant to pay the State the amount of taxes due. The commissioners could not, thereafter, release defendant's property from the lien created by statute, nor discharge defendant from its obligation. The tax must be paid in full or its payment avoided upon some of the other grounds allowed as a defense in section 32 of the revenue act (Compiled Laws, 3156.) *State v. Western Union Telegraph Company*, 4 Nev. 345.

There is no evidence to support the judgment; and it follows from the views we have expressed that the court clearly erred in refusing to grant a new trial. The defendant introduced evidence upon other defenses set up in its original and amended answers which is not contained in the record before us, nor was it passed upon in the court below.

State v. Harrington.

The order appealed from is reversed and the cause remanded for a new trial.

WHITMAN, C. J., did not participate in the foregoing decision.

THE STATE OF NEVADA, RESPONDENT, v. JAMES
HARRINGTON, APPELLANT.

MURDER—SUFFICIENCY OF INDICTMENT. An indictment for murder, charging that defendant at a certain time and place without authority of law and with malice aforethought did shoot deceased with a pistol and from the wounds produced from the shooting deceased died, though imperfect in form and objectionable on special demurrer, is not imperfect in substance and, if not specially demurred to, is cured by verdict.

CRIMINAL TRIALS—DEPARTURE FROM ORDER OF PROOF—DISCRETION. In a criminal trial, if a district court allows a departure from the ordinary order of proof and permits a re-opening of the case, as it may in the exercise of a sound discretion (Stats. 1861, 472,) it will be presumed, nothing being shown to the contrary, that such discretion was properly exercised.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

A difficulty occurred about two o'clock on the morning of July 6, 1873, in the chop-house of John H. Lynch, in the town of Pioche, Lincoln County. Defendant James Harrington, Lynch, Frank Schoonmaker, one O'Neil, and one Sullivan were present. Sullivan seized hold of a dog belonging to Schoonmaker and the result was a quarrel in which all the parties became more or less involved. Words led to blows, and in the melee it seems Harrington's pistol was fired three times, inflicting five wounds, one on the side of Schoonmaker, one through the wrist of Sullivan, one on the side of O'Neil, one on the shoulder of Lynch and one in the brain of Lynch, of which he died a few days afterwards.

It appears from the bill of exceptions that defendant introduced testimony tending to show that the number of wounds inflicted on different persons at the time Lynch was shot could not be made by three shots. After the defense had closed, the State called J. E. Tyler, and among other questions asked, "How many shots did you hear fired?" Defendant objected to the question on the ground that the prosecution had asked the same question on the examination in chief and on the further ground that there had been no testimony introduced by defendant proving or tending to prove the number of shots Tyler had heard. The court said: "I shall allow the testimony to be taken," whereupon counsel for defendant asked the court if defendant would be allowed to introduce more witnesses; that he could produce a dozen witnesses to prove there were more than three shots fired; to which the court replied that defendant could introduce as many witnesses as he choose, to make such proofs. The objection being overruled, and the witness, Tyler, as well as others on the same point, being allowed to testify, defendant excepted.

The defendant was convicted of murder in the second degree. His motion for new trial having been overruled, he was sentenced to imprisonment in the State prison for the term of fifteen years. He appealed from the judgment and order.

Crittenden Thornton, for Appellant.

I. The indictment is bad on general demurrer. It states the evidence of facts, instead of facts themselves. The accusation of murder can only be made out, if at all, by argument and inference. The vice is fundamental and incurable.

II. The court erred in permitting the testimony in rebuttal of the defendant's case. It was testimony in chief.

State v. Harrington.

It was merely cumulative of a large amount of testimony already put in by the State. Its use at that stage of the trial amounted in effect to a re-opening of the case for the prosecution, and worked a substantial and incurable injury to the defendant.

III. As the denial of the right to open or close may be error, so an undue indulgence may also be. An erroneous ruling not only justifies but demands a reversal. The order of proof is essential to be preserved. It is a matter of right, not of privilege. The discretion of the court is not arbitrary, but subject to examination and review. *Huckman v. Ferine*, 3 M. & W. Exch. 516; *Doe ex dem Brather v. Brayne*, 5 C. B. 655; 57 E. C. L. 655; *Geach v. Ingall*, 14 M. & W. 98; *Ashley v. Bates*, 15 M. & W. 589; *Davis v. Mason*, 4 Pickering, 156.

L. A. Buckner, Attorney General, for Respondent.

I. The indictment is direct as to the party charged, the offense charged, and the particular facts of the offense charged. It is therefore good. Criminal Practice Act, Sec. 232; *People v. Cronin*, 34 Cal. 191; *State v. Harkins*, 7 Nev. 384; *State v. Millain*, 3 Nev. 409; *State v. O'Flaherty*, 7 Nev. 153; *State v. Jones & Nery*, 7 Nev. 408.

II. Regarding the admission of the evidence objected to as a matter of "legal discretion" to be reviewed, there is no abuse of the power shown. On the contrary, the court acted with wisdom and justice. The defendant has not shown affirmatively any error and consequently no reason for reversal.

By the Court, BELKNAP, J.:

The defendant was convicted of murder in the second degree upon an indictment accusing him in the following

State v. Harrington.

manner of murder: "That the said James Harrington, in the town of Pioche in the said County of Lincoln, State of Nevada, on the sixth day of July, A. D. 1873, or thereabouts, without the authority of law and with malice aforethought did shoot one John H. Lynch with a pistol, and from the wounds produced from the shooting the said John H. Lynch died in the said town of Pioche, County of Lincoln, State of Nevada, on or about the eleventh day of July, 1873." This indictment, by fair and reasonable intendment, charges the defendant with the killing. Its form is argumentative, and this would have been a fatal defect upon special demurrer. The objection, however, was not taken; and the imperfection being of form and not of substance, is cured by the verdict.

After the defense had declared its evidence closed, the court allowed the prosecution to introduce further evidence in chief. The bill of exceptions shows that the defendant's counsel stated to the court that he had the additional evidence of a dozen witnesses upon the point to which the prosecution's evidence was directed. These witnesses were not introduced, although permission was requested and obtained for that purpose. The proper practice is for the State in the first instance to introduce its evidence in support of the indictment, after which evidence for the defense should be heard and then follows evidence in rebuttal. Neither side should withhold evidence upon the original cause. But in furtherance of justice the district court may in its discretion allow a departure from this order of proof and permit a re-opening of the case. Stats. 1861, 472. This discretion should be exercised for good reasons only and not to the prejudice of the adverse party. No injustice or abuse of discretion is here shown. In the absence of such showing we cannot interfere, but must conclude that the discretion was properly exercised. 1 Mon. (Ky.) 115; 29 Ill. 459; 48 Ill. 282; 36 Mo. 493; 4 Cal. 274; 3 Mich. 77; 10 Mich. 155; 18 Iowa, 290; 13 Iowa, 103.

State v. Birchim.

The judgment and order refusing a new trial are affirmed.

WHITMAN, C. J., did not participate in the foregoing decision.

THE STATE OF NEVADA, RESPONDENT, v. JOHN G.
BIRCHIM *et al.*, APPELLANTS.

RECOGNIZANCE—"BRIEFLY STATING NATURE OF OFFENSE." A recognizance, which gives the name of the offense for which the principal is held, sufficiently complies with the statutory provision (Crim. Pr. Act, Sec. 405,) of "briefly stating the nature of the offense."

RECOGNIZANCES AND COMMITMENTS, RULES OF CONSTRUCTION DIFFERENT. The reasons for setting forth the particulars of the offense in a commitment do not exist in the case of a recognizance; and therefore the construction requiring such particularity given to the words, "briefly stating the nature of the offense," as used in the statutory form of commitments (Crim. Pr. Act, Sec. 166,) is not applicable to the same words as used in the statutory form of recognizances (Crim. Pr. Act, Sec. 504.)

RECOGNIZANCES NOT IN STATUTORY FORM. It seems that a failure to follow the statutory form in giving a recognizance would not, if the obligation were in other respects plain, release the obligors from their liability.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

This was an action against John G. Birchim and P. W. Murray to recover the sum of one thousand dollars, the penalty of the recognizance set forth in the opinion. The defendants filed a general demurrer, which was overruled. There was a judgment as prayed for in the complaint. Defendants appealed.

Hillhouse & Hupp, for Appellants.

I. The recognizance sued on is fatally defective, for the reason that it does not state the *nature* of the offense upon

State v. Birchim.

which Pryor was admitted to bail. The words "grand larceny," as employed therein, amount simply to a designation of the offense charged, and cannot be said to constitute a statement of the *nature* of the offense as required by the statute. Stats. 1861, 489, Sec. 504. What did the legislature mean by the word "nature"? Certainly not the mere insertion of the name by which the given crime is known in the nomenclature of the law. Had such been the intention, it would have been easier and certainly more perspicuous to have said "naming the offense" than "stating briefly the nature of the offense." The word "nature" is of common use, and is thus defined: "The sum of qualities and attributes which make a thing what it is, as distinct from others; created or essential quality." Webster. "The state, properties or essence of any particular thing, or class of things, or that which constitutes it what it is." Worcester. "Essence, essential part; essential character; gist; pith; marrow." Roget's Thesaurus.

II. The same rule is to be observed in the construction of different sections of the same act, in relation to the same or germain subject matters. Now, sections 166 and 504 of the Nevada statute are exact transcripts of the sections of the California statute touching the forms of a commitment and recognizance. When we adopt the statute of a sister state, we also adopt the interpretation and construction which the highest court of that state has given to that statute. In *Ex parte Branagan*, 19 Cal. 133, it was held by the supreme court of California that the mere designation of the offense by name was not sufficient.

III. Upon principle and reason, the offense should be stated with a greater degree of certainty and minuteness in a recognizance than in a commitment. The purpose of the former is not only to set the prisoner free but also to compel his attendance whenever and wherever required by the court,

State v. Birchim.

even unto the execution of the judgment; in default of which appearance a heavy pecuniary penalty is imposed upon third parties guiltless of any infractions of the law, and who, *ex mera gratia*, have incurred that penalty for the purpose of aiding in the administration of the laws. The object of the latter, on the contrary, is merely to justify the officer in restraining of his liberty a man who has incurred the alternative hardship of temporary imprisonment by a criminal violation of those laws. See 1 Chitty on Criminal Law, 109; Hurd on Habeas Corpus, 376, 382, 383; Hale's Pleas of the Crown, 94; 2 Coke's Institutes, 52; *Ex parte Branagan*, 19 Cal. 135.

N. D. Anderson, for Respondent.

I. In the general doctrine that where we adopt the statutes of a sister state, we also adopt the interpretation given to those statutes, appellants are undoubtedly correct. But we deny the conclusion drawn from *Ex parte Branagan*. The commitment is the official act of the officer to show for what cause a party should be restrained of his liberty; nothing is to be presumed; nothing to be taken by intentment. The recognizance, on the other hand, is the voluntary act of the party liable under the law to be restrained of his liberty in order to obtain his freedom from bodily restraint. They are essentially different in their character. *People v. Kane*, 4 Denio, 530; *People v. Mills*, 5 Barb. 511; *Gildersleeve v. People*, 5 Barb. 35; Bacon's Abridgment, "Commitment, E."

II. Although the recognizance in this case is inartificially drawn, it has all the elements required to constitute a valid bail bond. *People v. Koeber*, 7 Hill, 43; *People v. Young*, 7 Hill, 46; *Champlain v. The People*, 2 Comstock, 82. The last cited case draws very clearly the true distinction between a commitment and a recognizance.

State v. Birchim.

III. A greater degree of certainty is required in the commitment than in the recognizance because the law in its humanity favors liberty so much, that why, by what authority and for what cause any human being is deprived of it, must distinctly and clearly appear. But to give liberty to one who is legally imprisoned charged with a violation of law, no such particularity is requisite.

By the Court, BELKNAP, J.:

Judgment was rendered against the defendants in an action upon the following forfeited recognizance :

“State of Nevada,
“County of Lander. } ss.

“An order having been made on the twenty-sixth day of October, A. D. 1872, by W. K. Logan, justice of the peace of the County of Lander, that A. E. Pryor be held to answer upon the charge of grand larceny upon which he has been duly admitted to bail in the sum of one thousand dollars, we, John G. Birchim and P. W. Murray of the said county, undertake that the above named A. E. Pryor shall appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times hold himself amenable to the order and process of the court, and if convicted shall appear for judgment, and render himself in execution thereof, or, if he fail to perform either of these conditions, that he will pay to the people of the State of Nevada the sum of one thousand dollars.

“J. G. BIRCHIM. [SEAL:]

“P. W. MURRAY. [SEAL.]

“Witnessed and approved by me, this 26th day of October, 1872.

“W. K. LOGAN, Justice of the Peace.”

State v. Birchim.

The statutory form for a recognizance set forth in section 504 of the Criminal Practice Act contains a blank to be filled by "stating briefly the nature of the offense." It is maintained that the words "grand larceny" employed in the bond do not fulfill the requirements of the statute, since they name the offense charged rather than state its nature. In other respects the recognizance follows the form of the statute. Sections 504 and 166 of the Criminal Practice Act of this State are borrowed from the state of California. Previous to their adoption, section 166, which declares that commitments shall "state briefly the nature of the offense and as near as may be the time when and the place where the same was committed," had received a judicial construction by the supreme court of that state. It is contended that this construction, so far as it relates to the words "nature of the offense," should govern us in construing section 504. True, the words to be construed are common to each section, and are contained in the same legislative enactment. But the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning must be determined by the subject to which they are applied. 5 Pet. 20.

The rules governing the construction of commitments and recognizances are essentially different. The common law has always protected the subject against arbitrary imprisonment by requiring the causes of his detention to be expressed upon the commitment. "A commitment," says Mr. Hurd, "in the absence of any statutory provisions prescribing its form and contents, does not sufficiently state the offense by simply designating it by the species or class of 'crimes to which the committing magistrate may consider it to belong; but it ought to state the facts charged or found to constitute the offense, with sufficient particularity to enable the court, on a return to a *habeas corpus*, to determine what particular crime is charged against the prisoner.'" Hurd on Habeas

Corpus, 382. In *Ex parte Branagan*, 19 Cal. 133, Chief Justice Field construed section 166 in reference to this common law principle. He considered the statute declaratory of the common law, and therefore held that the particulars of the offense should be stated in the commitment.

A recognizance, however, is the voluntary act of the obligors, and assumes the existence of a valid commitment. The reasons for setting forth the particulars of the offense in commitments do not exist in the case of recognizances, and the construction given to the words "nature of the offense," as they occur in section 166, is inapplicable to the same words in section 504.

Section 4968 of the laws of Iowa contains a form for recognizances similar to our section 504. It was held in *The State v. Marshall*, 21 Iowa, 143, where the principal was held to answer upon a charge of seduction, that the use of the word "seduction" in a bail bond was a sufficient compliance with the requirement of the statute to "state briefly the nature of the offense."

The word "nature" is defined by Webster as meaning "sort, kind, character or species," and we think this is the sense in which it is here used. The requirements of the statute are, therefore, substantially complied with.

We are not, however, restricted to a construction of the blank form in section 504. The object of this section is to provide a form which the magistrate may be required to accept. A failure to follow the form would not release the obligors from their liability. 2 *Ld. Raym.* 1138, 1459; *Phelps v. Parks*, 4 *Vt.*; 34 *Iowa*, 323.

The judgment of the district court must be affirmed. It is so ordered.

WHITMAN, C. J., did not participate in the foregoing decision.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JANUARY TERM, 1874.

EX PARTE D. L. BLANCHARD.

GIFT CONCERT ACT UNCONSTITUTIONAL. The act of March 3, 1861, to aid the Nevada Benevolent Association in providing means to erect an insane asylum (Stats. 1871, 110,) in so far as it authorized a lottery or allowed the sale of lottery tickets in this State, was unconstitutional.

ACT AUTHORIZING LOTTERY—CONSTRUCTION OF STATUTES EXCLUSIVELY A JUDICIAL POWER. Where a statute provided for gift concerts and distribution of prizes among ticket holders by raffle, and specially provided that "nothing in this act contained shall be construed as authorizing a lottery in this State or as allowing the sale of lottery tickets contrary to the provisions of the constitution" (Stats. 1871, 110): *Held*, that the construction of such act was for the courts alone and that the attempted exercise of this power by the legislature was an unconstitutional assumption of the functions of the judiciary.

LOTTERIES PUBLIC NUISANCES. The English statute of 10 and 11 W. III. c. 17, declaring lotteries to be public nuisances, constitutes a part of the common law of the United States, and was so understood by the framers of our constitution when they provided that "no lottery shall be authorized by this State."

GIFT CONCERT TICKETS LOTTERY TICKETS. Where a person was convicted of selling lottery tickets contrary to the act of March 7, 1873, prohibiting lotteries (Stats. 1873, 186); and the fact appeared to be that he had sold tickets to a gift concert under the act of March 3, 1871, in aid of the Nevada Benevolent Association (Stats. 1871, 110): *Held*, on habeas corpus, that the act of 1871, being unconstitutional as sanctioning a lottery, afforded no protection.

Ex parte Blanthard.

HABEAS CORPUS before the Supreme Court. The petitioner set forth that he with others had organized an association for the purpose of giving concerts to be held in the State of Nevada under authority of "An act to aid the Nevada Benevolent Association in providing means to erect an insane asylum," approved March 3, 1871; that many tickets were issued and sold by the said association, each ticket entitling the holder to admission to such concerts and to a chance of drawing a certain sum of money, said association having prizes aggregating \$265,000, and ranging in value from \$5 to \$50,000; that the association issued twenty thousand and seventy-one tickets and sold nineteen thousand thereof prior to March 3, 1873; that said concerts were to be held and prizes drawn in Virginia City in February, 1873, but as all the tickets were not sold by that time the concerts and drawing were postponed till March 4, 1874; that on January 2, 1874, the petitioner, being managing agent of the association, sold tickets; and that in consequence thereof he was illegally restrained of his liberty at Virginia City by the sheriff of Storey County.

Lewis & Deal, for Petitioner.

I. The State having encouraged this thing, taken two thousand dollars of its money, accepted its bond, the law should be construed, if possible, so as not to include it.

II. There can be no presumption that the legislature intended to reach this lottery by the act of 1873. The presumption is the other way. The act of 1873 does not repeal the act of 1871 in terms, and this is some evidence in itself that the legislature did not intend to reach persons engaged in this lottery. This conclusion is irresistible when it is borne in mind that the legislature by the former act expressly declared that this gift enterprise was not a lottery. There was then no intention to make the last act cover the lottery

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Ex parte Blanchard.

organized under the former act or persons acting thereunder, and therefore no one can be punished who did so act under it.

III. At common law gaming of itself was not unlawful (and this may be admitted to be gaming.) *Quarrier v. Colston*, 1 Phillips, 147; Story on Contracts, Sec. 565. In *Wardell v. Wait*, Kent held subsequent act not applicable to a lottery already organized. 7 Johns. 440; 3 Kent, Sec. 277. Gaming was only unlawful at common law when practised in gaming houses, and then only because such houses were deemed nuisances, or because they had a tendency to gather together idlers, or to occasion breaches of the peace, or to corrupt morals, or because contrary to public policy. But none of the reasons apply to this case because this is not carried on in a gaming house; it has no tendency to gather together idlers, nor to occasion breaches of the peace, nor to corrupt public morals. Such enterprises are allowed by statutes in some states—in Massachusetts, for example, and other states.

IV. There was no statute prohibiting it at the time this gift concert was organized. All its contracts were legal therefore, unless the constitution affected it. But what is the character of the constitutional provision? It does not prohibit lotteries, but only restricts the power of the legislature respecting them. Const. Art. IV., Sec. 24. If it had been considered illegal or contrary to public policy or detrimental to the public, the framers of the constitution would themselves have prohibited it. But knowing that lotteries were legal, they simply restricted legislative power as to them. The conclusion is irresistible that they simply intended to keep the State out of lotteries, or to prevent the State from authorizing them. If such be the case, the constitution itself did not render this lottery illegal, and it could only become so by legislative action. Notwithstanding the constitution then, the lottery was legal. The conclusion is

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Ex parte Blanchard.

that the contracts entered into to draw the lottery and distribute prizes were legal contracts, and the Penal Act of 1873 destroys that contract.

By the Court, BELKNAP, J.:

The "Nevada Benevolent Association" was authorized by an act of the legislature, approved March 3, 1871, to give not exceeding three public entertainments or gift concerts, and to sell tickets of admission to the same entitling the holder to participate in a distribution of awards "by raffle or other scheme of like character." The petitioner is the managing agent of the association. He has been arrested and is in custody for selling lottery tickets, contrary to the provisions of the statute, approved March 7, 1873, entitled "An act to prohibit lotteries." The tickets sold were those of the "Nevada Benevolent Association."

It is clear that the act of March 3, 1871, sanctions a lottery. The character of the scheme is in no wise changed by the charitable purpose expressed in its title, nor by calling the drawings "entertainments or gift concerts." The fifth section of the act declares that "nothing in this act contained shall be construed as authorizing a lottery in this State, or as allowing the sale of lottery tickets contrary to the provisions of the constitution."

The State government is divided by the organic law into executive, legislative and judicial departments, and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others except in cases expressly directed or permitted. Const. Art. III. The construction to be placed upon this act must be determined by the court alone. The attempted exercise of this power by the legislature was an assumption of the functions of the judiciary, and must be disregarded.

Ex Parte Blanchard.

By statute 10 and 11, W. III. c. 17, all lotteries are declared to be public nuisances. 4 Bl. Com. 168. This statute remained in force in England at the time of the declaration of American Independence, and being applicable to our situation, constitutes a part of the common law of the United States. From the language employed in the constitution, it is evident that this was the understanding of its framers. In the restriction upon the power of the legislature, it is not said that lotteries shall be prohibited, but that "no lottery shall be authorized by this State." This constitutional clause considered in the light of the common law implies that lotteries could be lawfully created by authority of the legislature only. But this authority was withheld, and the act of March 3, 1871, being in direct violation of the prohibition, is unconstitutional. Since, then, this lottery is unauthorized by common law or valid statute, it follows that the objection urged that the act of 1873 impairs the obligation of contracts is without force.

We are of opinion that the act to prohibit lotteries took effect, as by the terms of its tenth section it is declared it shall, "from and after the first day of January, one thousand eight hundred and seventy-four," and is applicable to tickets sold under the act of the legislature of March 3, 1871, entitled "An act to aid the Nevada Benevolent Association in providing means to erect an insane asylum."

The petitioner is remanded to the custody, whence he came.

WHITMAN, C. J., did not participate in the foregoing decision.

State v. Ferguson.

THE STATE OF NEVADA, RESPONDENT, v. OWEN FERGUSON, APPELLANT.

QUESTION OF JUSTIFIABLE HOMICIDE IN CASE OF COMBAT. In a murder case where the defense was justifiable homicide, and the testimony showed a quarrel and combat between defendant and deceased, the court, after charging in relation to the law of murder and manslaughter, added, "And to justify the homicide it must appear that there existed an unavoidable necessity, without any will or desire, or without any inadvertence or negligence in the party killing :'" *Held*, that the principle announced (Crim. Pr. Act, Sec. 29) related to an entirely different class of cases from that presented by the testimony, and that the charge was clearly erroneous.

CHARGING DIFFERENT WAYS—PRESUMPTION. Where the record in a criminal case shows that the court differently defined the law upon any given subject, one clause being correct and the other erroneous, injury will be presumed to follow, unless it clearly appears that no injury resulted therefrom.

JUSTIFICATION OF HOMICIDE—WHEN "UNAVOIDABLE NECESSITY" REQUIRED. Where in case of a homicide, claimed to have been committed in self-defense, the court charged that "To justify the homicide it must appear there was an unavoidable necessity :'" *Held*, that this was very different from the language of the statute that "Justifiable homicide may also consist in unavoidable necessity" (Crim. Pr. Act, Sec. 29) and a perversion of its sense.

MURDER—PHYSICAL DISABILITY OF ACCUSED. Where in a murder case defendant asked an instruction that "If defendant was, at the time of the alleged homicide, laboring under great physical disability, such as to render him unable to cope with deceased in a fight where weapons were not used, the defendant had a right to use any means in his power to protect himself if attacked :'" *Held*, clearly wrong, as it would give a person when attacked the right to take the life of his assailant, without reference to the fact whether or not the circumstances of the assault were sufficient to excite the fears of a reasonable person that he was in danger of his life or of receiving great bodily harm.

JUSTIFIABLE HOMICIDE—DEFENDANT'S BELIEF OF DANGER. An instruction asked by defendant in a murder case that "If at the time of the homicide defendant had reason to believe, and did believe, that he was in danger of receiving great bodily harm at the hands of deceased, he had a right to defend himself, even to the taking the life of his adversary :'" *Held*, erroneous, in this: that it assumed that defendant was without fault.

WHEN HOMICIDE JUSTIFIABLE—SELF-DEFENSE. In order to justify a homicide, claimed to have been committed in self-defense, it must appear that to defendant's comprehension, as a reasonable man, he was actually in danger of his life or of great bodily harm, and that to avoid such danger it was absolutely necessary for him to take the life of deceased.

State v. Ferguson.

CRIMINAL LAW—PRACTICE ON REFUSING INSTRUCTIONS ALREADY GIVEN. If an instruction is refused because its substance has been given, that fact should be stated and noted on the instruction.

EVIDENCE—MORAL CERTAINTY. Moral certainty, as distinguished from mathematical certainty beyond the possibility of a doubt, is all that the law ever requires in order to establish a fact beyond a reasonable doubt to the satisfaction of a jury.

CRIMINAL LAW—DECLARATIONS OF DEFENDANT—RES GESTÆ. In a criminal case, to make the declarations of defendant admissible evidence in his favor, it must appear that they constituted parts of the *res gestæ*.

IMPEACHMENT OF WITNESS—GENERAL MORAL CHARACTER NOT IN ISSUE. Upon impeachment of a witness, it is his general reputation for truth and veracity, and not his general moral character, which is in issue.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The defendant was indicted on July 21, 1873, of the murder of Robert Ash, alleged to have been committed in Lincoln County on July 13, 1873. He was tried in August following; and, having been convicted of murder in the first degree, and his motion for a new trial having been overruled, was sentenced to be hanged on October 31, 1873. He appealed from the judgment and order.

It appeared from the testimony of J. Farley, a witness for the prosecution, that Williams, the steward of the hospital where the homicide occurred, on the day of the homicide and previous thereto, suspecting that defendant had a knife or pistol which defendant denied, searched him. On cross-examination and referring to this time, defendant asked the question: "State whether or not you heard defendant at that time say to Williams—I mean before the search—that he asked Williams to pay Ash off and let him go or else he (Ash) would kill somebody, or words of like import." The prosecution objected on the ground that it was not cross-examination, and was irrelevant and immaterial for the reason that no declaration of the defendant of this character

State v. Ferguson.

could be testimony in the case. The court sustained the objection and defendant excepted.

The facts relating to the homicide are stated in the opinion.

Ellis & King and Crittenden Thornton, for Appellant.

I. The instruction, asked by defendant, which required the jury to be satisfied beyond a reasonable doubt and to a moral certainty, or in other words entirely satisfied of the guilt of the defendant, contained the law, clearly and concisely stated. *People v. Padilla*, 42 Cal. It was not given in substance by the court, nor in any of defendant's instructions which were given. If refused because given in substance in another portion of the charge, such reason should be noted on the instruction. *State v. Bonds*, 1 Nev. 35; *People v. Williams*, 17 Cal. 147; *People v. Lachanais*, 32 Cal. 433.

II. The court erred in adding to the third and fourth instructions asked by defendant, because the instructions contained the law and the addition added an erroneous qualification. 2 Bishop Crim. Law, Secs. 643, 644; *People v. Campbell*, 30 Cal. 312.

III. The court erred in the use of the following language to the jury: "And to justify the homicide it must appear that there existed an unavoidable necessity without any will or desire, and without inadvertence or negligence in the party killing." This is radically wrong; such never has been the law, and is a perversion of Sec. 29 of the Crimes Act. Stats. 1861, 60, Sec. 29; *People v. Campbell*, 30 Cal. 312.

IV. There was error in the exclusion of the question asked the witness Farley in regard to the remark of the defendant to Williams. It was relevant as a portion of the res gestæ. The court proceeded upon the ground that it was not admissible in any event. The question proposed to

State v. Ferguson.

elicit the existing mental condition of the defendant. It was relevant for the same reason that the threats were. As a general rule any declaration contemporaneous with the main fact in issue, explanatory of accompanying circumstances or the then passions, emotions, purposes, sufferings or intents of the speaker, are a part of the *res gestæ*. The evidence would have established the primary conditions of the law of self-defense; an indisposition to continue the quarrel and a desire to avoid further controversy. 1 Phillips on Evidence, 231; *Insurance Co. v. Mosley*, 8 Wall. 103; *Avison v. Kinnaird*, 6 East, 188; *Thompson v. Trevanion*, Skin. 402; *People v. Scoggins*, 37 Cal. 677; *Dukes v. The State*, 11 Ind. 566.

V. The evidence sought to be elicited from various witnesses in regard to the moral character of the witness Williams, was improperly excluded. It was well understood by court, witnesses, counsel and jury, that it was only intended to investigate Williams' character for truth and veracity, and not in regard to honesty, venality, virtue or sobriety. An inquiry designed to elicit evidence competent in itself, and understood by court, counsel, witnesses and jury, according to its intended and legitimate effect, should not be excluded by a literal and verbal construction.

L. A. Buckner, Attorney General, for Respondent.

I. The first instruction asked by defendant was properly refused. The jury were to be sure to a moral certainty, not to a mathematical or physical certainty, that the defendant was guilty as charged in the indictment. Criminal Practice Act, Secs. 387, 388.

II. If there was any error in the third instruction it was against the State. The defendant was bound to prove that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm,

State v. Ferguson.

the killing of Ash was absolutely necessary, and not only this but that he did not create the necessity, or if he was originally the assailant, that he had really in good faith, endeavored to decline any further struggle before the mortal blow was given. Stats. 1861, 60, Sec. 25; 2 Bishop on Criminal Law, 565; 2 Foster, 227; *State v. Hill*, 4 Dev. and Bat. 491; *State v. Howell*, 9 Ire. 485; 1 Hale P. C. 482.

III. A bare fear that Ash would do defendant great bodily harm was not sufficient to justify him in killing Ash; the circumstances must appear to have been sufficient to excite the fears of a reasonable person; and in addition that Ferguson acted under the influence of those fears, and not in a spirit of revenge. *Dyson v. State*, 26 Miss. 362; *Harrison v. State*, 24 Ala. 67; *Dupree v. State*, 33 Ala. 380. So it is plain the court did not err in refusing the fourth instruction as asked and in qualifying it.

IV. The words "and to justify the homicide it must appear that there existed an unavoidable necessity, without any will or desire, and without any inadvertence or negligence in the party killing" were in fact intended to be a separate paragraph and to commence what the court had to say of justifiable homicide, giving its various kinds. So far it was correct. Suppose it had been given in an independent instruction, would it not have been abstractly correct? Now this is just what the court did say, but awkwardly expressed.

V. The question asked Farley was properly ruled out. What defendant said to Williams was not a part of the *res gestæ*. The evidence would not have shown or tended to show that Ash was the assailant. All that was claimed was that there was a mutual combat and so defendant put himself without the pale of the law of self-defense.

VI. It seems to be admitted that the evidence sought, in relation to the character of Williams, was his character

State v. Ferguson.

for truth and veracity. It is plain that general moral character would have been irrelevant; and the questions were therefore properly excluded.

By the Court, HAWLEY, J. :

The defendant was convicted of murder in the first degree. The court below refused to grant him a new trial ; hence this appeal.

Defendant admitted the homicide and claimed that it was justifiable. The fight occurred on the 13th of July. Ash (deceased) was an Englishman and an Orangeman. Ferguson (defendant) was an Irishman and a Roman Catholic. Both were inmates of the county hospital ; Ash as a cook, Ferguson as a patient. Both were under medical treatment. Dr. Deal, the county physician, testified that "they were both sick men," and that he had "no means of judging which was the superior in physical strength." Ash was suffering from disease of the veins of the right leg, but was attending to his duties as a cook. Ferguson, owing to a deformity in his left arm and leg, was unable to perform such duties. His general health was good and he had been informed that he would not receive any more medical treatment. Harsh words had passed between them during the day relative to their respective places of nativity and religious belief. Each had applied to the other offensive, abusive and vulgar epithets, well calculated to provoke a fight. Ash was frequently importuning Williams, the steward, for his pay. He said that he "wanted to have something to travel on" and "to be placed in such a position so that he could lick three or four Irish," etc. Ferguson said to Williams, "for mercy's sake pay that man off or he will kill somebody, or do some harm, or get himself hurt." About 5 o'clock in the afternoon the witness Farley heard "Ash and defendant scolding and calling each other names." After bandying epithets for

State v. Ferguson.

some time, Ash said "that he could whip defendant," and the defendant told him "to pitch in." Ferguson at this time was in his bed-room and Ash was in the hall.

The testimony is conflicting. Williams was a witness for the State and, in his testimony relative to the beginning of the fight, said: "They both met at the door; both of them clinched, and both of them struck each other." Hunt, a witness for the defense, testified that Williams caught "Ferguson by the arm and said 'get out of here and fight on the outside;' he gave him a jerk by the arm at the time he stepped from between them. Ash hit Mr. Ferguson over the left eye, and almost simultaneously Mr. Ferguson struck Ash. * * * I could discriminate a little difference between the blows. In the meantime Mr. Ferguson could not get out of the hall. * * Ash held Ferguson by the throat." From the testimony of defendant, who was a witness in his own behalf, it appears that Ash had said to him: "If I get my hands on you, I won't leave a bone in your body that I won't break. I will fix you. I will break your game leg for you." After giving a very minute and lengthy statement in regard to the conduct of Ash on the day of the homicide, defendant testified as follows: "He called me all the abusive language in the world, * * I stepped up and caught hold of the door to pull it to me so as not to listen to him; * * * then Scotty (Williams) gave me a pull and landed me into the hall; then Ash gave me a blow * * over the right eye. He shoved me right along until I came to * * the corner. Before this I gave him a punch and knocked him down, * * backed away from him * * *; he got me by the throat and gave it to me pretty well * * *; therefore I was forced to exert myself to save my life." During the fight some fifteen or twenty wounds were inflicted upon the person of the deceased. The weapon used by defendant was a dissecting knife, the property of Williams.

In view of this testimony, we are of opinion that the cour

in its charge to the jury so mutilated one section of the statute as to entirely deprive defendant of his plea of self-defense. It is quite evident that the court failed in discriminating what sections of the statute were relevant.

1. After charging the jury as follows: "If you believe from the evidence that the defendant procured a knife with a premeditated intention to engage in a fight with the deceased with the intention of doing great bodily harm, then the killing would be murder; but if you believe that the defendant had no malice aforethought towards the deceased at the time of the homicide, but used the knife in the heat of passion and not in necessary self-defense of life or great bodily harm, then the offense can only amount to manslaughter;" the court adds: "*And to justify the homicide it must appear that there existed an unavoidable necessity, without any will or desire and without any inadvertence or negligence in the party killing.*"

Why this clause relative to justifiable homicide was inserted, or what it means in this connection, is beyond comprehension. It is a clear perversion of the sense of the section of the statute from which it is partly copied. Stats. 1861, 60, Sec. 29. This section relates to an entirely different class of cases from that presented by the testimony, and hence its provisions should not have been embodied in any form in the charge of the court. The attorney general admits that the court made a mistake in inserting any portion of section 29, in the connection where used; but contends that it could not have prejudiced defendant because it was not relevant to the issues presented, and for the further reason that the court in another portion of the charge gave the proper statutory definition of justifiable homicide by copying the first sentence of section 25, and all of sections 26 and 27 of the "act concerning crimes and punishments." Stats. 1861, 60. This position cannot be maintained.

State v. Ferguson.

The principle of law is well settled that where the record in a criminal case shows that the court differently defined the law upon any given subject—one clause being correct, another erroneous—that injury must be presumed to follow from such a state of facts, unless the record clearly shows that no injury resulted therefrom. *People v. Campbell*, 30 Cal. 312; *Holmes v. State*, 23 Ala. 23; *Logue v. Commonwealth*, 38 Penn. State, 269. It is impossible for this Court to determine which clause of the charge the jury acted upon or what effect the erroneous one had upon the deliberations of the jury. It may be that the jury detected at once the utter absurdity of the erroneous part of the charge and entirely disregarded it in finding their verdict. But when we consider that it was the duty of the jurors to take the law from the court and that this duty was specially pointed out in the court's charge, as follows: "It is your duty to be governed by the law as given you by the court, regardless of anything to the contrary that may have been said to you by counsel on either side," the natural presumption becomes conclusive that the jury did consider the erroneous clause; and, for aught we know, it may have controlled their verdict. The law does not conclude the rights of individuals or parties upon any such uncertain grounds. Its utmost effort is accuracy, as far as it may be attained through fallible agencies, and then its mission is complete and its conclusions irrevocable.

It is not necessary to consider whether it would have been such an error as to mislead the jury to the prejudice of defendant, if the court had correctly copied section 29 as an independent instruction and in the order where it is found in the statute. There is a marked difference in the language of the statute, that "justifiable homicide may also consist in unavoidable necessity," from that used by the court, "and to justify the homicide it must appear that there was an unavoidable necessity." By this change in the phraseology,

the whole sense of the statutory provision is perverted. This portion of the charge is palpably inapplicable and erroneous.

2. The third and fourth instructions as asked by counsel for defendant, read as follows: "Third—If the jury believe from the testimony that defendant was at the time of the alleged homicide laboring under great physical disability such as to render him unable to cope with deceased in a fight where weapons were not used, the defendant had a right to use any means in his power to protect himself if attacked." "Fourth—If the jury believe from the testimony that defendant at the time he committed the homicide had reason to believe, and did believe, that he was in danger of receiving great bodily harm at the hands of deceased, then he had a right to defend himself even to the taking the life of his adversary." To each of which the court added: "But it must appear that the killing of deceased was absolutely necessary, and it must appear also that the person killed was the assailant or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given," and marked on each instruction "Given in connection."

Neither of the instructions was correct. The court had the right either to refuse them, or add thereto such qualifications as were necessary to state the law correctly. The principle as announced in the third instruction was clearly wrong. It would give to a defendant when attacked the right to take the life of his assailant in all cases where he is laboring under such physical disability as to render him unable to cope with his assailant, without any reference to the vital and controlling fact, whether or not the circumstances of the assault were sufficient to excite the fears of a reasonable person that he was in danger of his life or of receiving great bodily harm. The fourth instruction was

State v. Ferguson.

erroneous, in this: that it assumed that defendant was without fault.

If Ferguson was in the wrong, the killing of Ash would not be justifiable; but the offense would be either murder in the first or second degree, or manslaughter, as the evidence might justify. The addition made by the court to each of these instructions was, in our judgment, calculated more to confuse than to enlighten the jury. It is undoubtedly true that it must appear that the killing of deceased was absolutely necessary, "But," as was said by Rhodes, J., in *People v. Campbell*, 30 Cal. 315, "it is not necessary under the statutory rules * * * that the jury shall find that the killing was absolutely necessary beyond the possibility of a doubt; for that could be made to appear only upon the infliction of the injury by the assailant, which the person assailed is permitted to protect himself against by killing the assailant."

In order to justify the homicide it must appear to the defendant's comprehension as a reasonable man that he was actually in danger of his life, or of receiving great bodily harm; and that to avoid such danger it was absolutely necessary for him to take the life of the deceased. "The inquiry" as was said by Cole, J., in *State v. Collins*, 32 Iowa, 39, "is not whether the harm apprehended was actually intended by the assailant; but was it actual and real to the accused as a reasonable man as compared with danger remote or contingent."

By the frequent use of the words "absolutely necessary," as found in the instructions and charge, the jurors may have drawn the inference that before they would be justified in acquitting the defendant it must appear to *them* that the killing of deceased was absolutely necessary. This view of the case would virtually deprive a defendant of a reasonable exercise of his own judgment in determining from all the circumstances what was necessary to be done for the protec-

State v. Ferguson.

tion of his person or his life—a right which the law confers upon every individual ; but one that must always be exercised at his peril, subject to revision by a jury of his peers. Bishop states the rule as follows : “ Whenever a man exercises his right of self-defense, he must be understood to act on facts as they appear to him. And if, without fault or carelessness, he is misled concerning them and defends himself correctly according to what he supposes the facts to be he is justifiable, though they are in truth otherwise, and he has really no occasion for the extreme measure.” 1 Bishop on Crim. Law, Sec. 384.

This principle was announced by Judge Parker, afterwards Chief Justice of Massachusetts, in *Selfridge's Case*; endorsed by the supreme court of New York in *People v. Shorter*, 4 Barb. 477 ; affirmed in the court of appeals, *Shorter v. People*, 2 Comstock, 197, and is sustained by the weight of reason and a decided preponderance of the authorities. *Oliver v. State*, 17 Ala. 599 ; *State v. Harris*, 1 Jones (N. C.), 193 ; *State v. Sloan*, 47 Mo. 604 ; *Meredith v. Commonwealth*, 18, B. Monroe, 49 ; *Logue v. Commonwealth*, 38 Penn. 267 ; *Campbell v. People*, 16 Ills. 19 ; *Pond v. People*, 8 Mich. 150.

This being the law, it follows that if Ferguson was without fault and had reasonable ground to believe, and did believe, that he was in danger of his life or of receiving great bodily harm from Ash, and that this could only be prevented by his using such means of defense as were within his power, and he acted under such belief and not in a spirit of revenge, then the killing of Ash was justifiable. Whether there was an absolute necessity for a resort to such means was a question for him to decide at the time ; and, although he may have erred in his judgment as to the existence of such necessity, still if from all the attending facts and circumstances he in good faith believed, and had reasonable grounds for believing, that his only safety was in using the means then in his power to prevent Ash from killing him or inflicting

State v. Ferguson.

great bodily harm, the use of such means was justifiable. Whether from the testimony such a state of facts existed was a question for the jury to determine.

3. It is claimed that the court erred in refusing this instruction: "The jury must be satisfied beyond a reasonable doubt and to a moral certainty or, in other words, entirely satisfied of the guilt of defendant, or they should acquit." All men do not express their ideas in the same language, nor give to all words the same meaning; hence it is usual for courts to give instructions in the language employed by counsel, whenever the same contain correct principles of law and are not calculated to mislead the jury. If an instruction is refused because its substance has been given by the court, that fact should be stated and noted on the instruction, otherwise it might be such an error as to deprive the defendant of a substantial right. *People v. Bonds*, 1 Nev. 35; *People v. Williams*, 17 Cal. 147; *People v. Lachanais*, 32 Cal. 433.

The last sentence, in the instruction under review, was evidently intended by counsel as explanatory of the first. If the jurors were "satisfied beyond a reasonable doubt, and to a moral certainty," they must have been *entirely satisfied*; and taken in this sense the addition of the latter sentence was, as we think, a useless repetition, surplusage, but not erroneous. The court, having in its charge copied the language of C. J. Shaw in *Commonwealth v. Webster*, 5 Cush. 320, in regard to reasonable doubt, should have noted on this instruction that it was refused because it had in substance been correctly given by the court. The words "entirely satisfactory" may be so used as to convey the idea that the jury must be satisfied to a mathematical certainty, beyond the possibility of a doubt, and when so used should always be rejected by the court.

Moral certainty is all that the law ever requires in order to establish any fact beyond a reasonable doubt to the satis-

State v. Ferguson.

faction of a jury. Infallibility belongs not to men, and even their strongest degree of moral assurance must be often accompanied by the possible danger of a mistake; but, after just effect has been given to sound practical rules of evidence, there will remain no other source of uncertainty or fallacy than that general liability to error which is necessarily incidental to all investigations founded upon moral evidence, and from which no conclusion of the human judgment in relation to questions of contingent truth can be absolutely and entirely exempt. "In the ordinary affairs of life," says Greenleaf, "we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd." Starkie, after a careful review of this subject, lays down the rule as follows: "What circumstances will amount to proof can never be matter of general definition; the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury: * * * absolute, metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt." 1 Starkie Ev. Sec. 514; *Sumner v. State*, 5 Blackford, 582; *Giles v. State*, 6 Georgia, 286; *McCann v. State*, 13 Miss. 489. It certainly will not be contended that any higher degree of proof is necessary where, as in the present case, the testimony is direct.

4. The objections of counsel relating to the admissibility of certain testimony may be summarily disposed of. To make the declarations of defendant admissible it must appear that they constituted parts of the *res gestæ*. "To have become such," says Hosmer, C. J., in *Enos v. Tuttle* (3 Conn. 250,) "they must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize

State v. Stewart.

with them as obviously to constitute one transaction." 1 Greenleaf on Ev. Sec. 108, and authorities there cited; *State v. Ah Loi*, 5 Nev. 100.

5. It was the reputation of Williams for truth and veracity, not his general moral character, that was in issue; and counsel should have confined themselves to that question. To be a competent witness the person testifying must be acquainted with the general reputation of the witness sought to be impeached in the community where such witness resides.

The judgment of the district court is reversed and the cause remanded for a new trial.

WHITMAN, C. J., did not participate in the foregoing decision.

THE STATE OF NEVADA, RESPONDENT, v. JOHN STEWART, APPELLANT.

THE LAW OF SELF-DEFENSE. The law of self-defense is founded on necessity; and in order to justify the taking of life upon this ground it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm; but it must also appear to the defendant's comprehension, as a reasonable man, that to avoid such danger it was necessary for him to take the life of the deceased.

RIGHT TO BE GIVEN DEFENDANT'S OWN TESTIMONY. In a criminal case the jury has the right to believe such portions of defendant's own testimony as they consider true, and to disbelieve such portions as they consider false: his testimony, like that of other witnesses, is to be weighed and determined by the jury from all the surrounding circumstances of the case.

MERE THREATS WILL NOT JUSTIFY HOMICIDE. Mere threats, unaccompanied by some demonstration of hostility, from which the accused might reasonably infer the intention of their execution by deceased, will not justify homicide.

State v. Stewart.

MEANING OF "MALICE AFORETHOUGHT." Where in a murder case the court instructed the jury "that malice aforethought of the statute means a wrongful act done intentionally and without legal cause or excuse:" *Held*, no error.

CRIMES ACT, SEC. 26, AS AN INSTRUCTION. As a bare fear that defendant is in danger of his life, or of receiving great bodily harm, will not justify him in taking life: *Held*, in a murder case, where defendant claimed to have acted in self-defense, that reading section 26 of the act concerning crimes and punishments as an instruction to the jury, was not error.

READING FROM STATUTE IS NOT GIVING ORAL INSTRUCTION. Reading certain sections from the statute as instructions to the jury, is not giving oral instructions.

ARGUMENTS, WHERE CASE SUBMITTED ON OTHER SIDE. Where, in a criminal case, the State was represented by two attorneys; and after the first had opened the argument to the jury, the defendant's attorney submitted the case and objected to any further argument; but the other attorney for the State was allowed to address the jury: *Held*, no abuse of discretion.

IMPEACHMENT OF VERDICT BY JUROR. No juror should ever be allowed to impeach the verdict of a jury by testifying to his own misconduct or by asserting his ignorance of the law.

RECOMMENDATION TO MERCY NO PART OF VERDICT. A recommendation to mercy by a jury, in a criminal case, is no part of their verdict, and should not be recorded with it.

APPEAL from the District Court of the Third Judicial District, Esmeralda County.

Defendant was convicted on November 20, 1873, of the crime of murder in the first degree. The jury recommended him to the mercy of the court. His motion for a new trial having been overruled, he was sentenced to be hanged on January 9, 1874. He then took this appeal.

The circumstances of the killing are set forth in the opinion of the Court, as are also several of the instructions given and the objections taken by counsel at the trial of the cause in the court below. In addition to the instructions therein repeated, two others, called the second and fifth, are referred to. The second, as asked by defendant and given by the

State v. Stewart.

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State v. Stewart.

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State v. Stewart.

court, was as follows: "2. If the jury find from the evidence that the defendant, John Stewart, on or about the 4th day of May, 1873, at the County of Esmeralda, did kill Frank Durand; and that said Durand had threatened at divers times during the two or three weeks immediately preceding the said 4th day of May, 1873, that he would kill the defendant, John Stewart; or if the jury find that the said John Stewart had been informed and verily believed that said Durand had made such threats; and that the said John Stewart verily and reasonably believed at the moment he killed said Durand that said Durand was attempting to kill him (Stewart) and that he was in imminent danger of losing his life or of suffering great bodily harm; then in that case the defendant was not bound to attempt to escape if he reasonably believed that such attempt to escape would greatly increase the danger to his life or person."

The fifth instruction, asked by defendant and refused by the court, was as follows: "5. In determining whether the defendant had reason to believe and did believe at the time of the killing that deceased was intending and attempting to take his life, you are entitled to consider the testimony of the defendant; and in all matters, wherein the defendant is uncontradicted by the facts and circumstances of the case or the testimony of one or more of the witnesses, you ought to receive the defendant's statement as the truth."

The affidavit of J. M. Collins, one of the jurors, by which it was attempted to impeach the verdict, set forth "that upon the evidence given on the trial of said cause he (Collins) had, while deliberating upon said verdict, reasonable and grave doubts that the said defendant was guilty of murder in the first degree; that he stated to his fellow jurors in said cause that he (Collins) could not conscientiously render a verdict upon the evidence in said cause, which would legally require the penalty of death to be inflicted upon the said defendant; that D. F. Manning, foreman of said jury, and

State v. Stewart.

others of deponent's fellow jurors in said cause, then agreed with this deponent that if said jury would render a verdict in said cause of murder in the first degree and at the same time recommend the said defendant to the mercy of the court, then in such case the said court would have discretion to sentence the said defendant to be imprisoned at hard labor in the State prison of this State during the term of his natural life as a full and sufficient punishment for such crime. Deponent further says that he was convinced by the arguments of the said D. F. Manning and others of his fellow jurors in said cause; that he believed what they said as above set forth, and that he thereupon agreed to the said verdict as above set forth. Deponent further says that he believed from the statements of the said D. F. Manning and others of his fellow jurors as above set forth that the court had such discretion as above stated, and that upon consideration of the evidence the court would only sentence the said defendant to imprisonment as above stated; and that, if he (deponent) had not believed the court had such discretion and would so exercise it, he never would have consented or agreed to said verdict as above set forth."

Robert M. Clarke, for Appellant.

I. There was error in denying defendant's motion to submit the cause without further argument, after the State's attorney had concluded his address to the jury, and in permitting Thomas Wells, Esq., of counsel for the State, to make a second argument after defendant had declined to argue. Crim. Pr. Act, Sec. 355.

II. There was error in the modification of the third instruction asked by defendant. The definition of malice aforethought, added by the court, was clearly erroneous, and could have had no other tendency than to mislead the jury. 1 Dev. & Bat. 121; 10 Mich. 212; 1 Russell on Crimes, 482.

III. There was error in refusing the fourth instruction asked by defendant. It was not necessary that the danger should be real; it was sufficient that it *appeared* to be real. It was not necessary for the defendant to wait until he was actually assailed; it was sufficient if he believed as a reasonable man, and had reason to believe that Durand was attempting to take his life. 1 Bishop Crim. Law, 305 and note; 17 Alabama, 587; 37 Cal. 683; 8 Mich. 150; 2 Wright (Pa.) 266; 18 B. Mon. 49; 8 Bush, 488.

IV. There was error in refusing the fifth instruction asked by defendant because defendant was a competent witness, and was entitled to be treated as any other witness. *People v. Cronin*, 34 Cal. 204.

V. There was error in reading sections 18, 19, 20, 25, 26, and 27 of the Crimes Act to the jury because all instructions must be written, and should be delivered to the jury. Criminal Pr. Act, Secs. 387, 393, 355; 8 Cal. 423; 12 Cal. 345; 26 Cal. 78; 43 Cal. 34; 1 Nev. 36. Also, because section 26 was inapplicable and calculated to mislead the jury.

VI. There was error in instructing the jury that "no threats or menaces made by the deceased against the defendant, John Stewart, can avail Stewart, unless he at the time of the killing was actually assailed or had sufficient evidence to convince any reasonable person that he was in danger of incurring bodily injury or of losing his life at the hands of the deceased." "Threat" and "menace" are not exactly synonymous terms. To draw or to attempt to draw in a threatening manner a pistol would be a menace (see Webster; 2 Bishop Crim. Law, Sec. 23, note 1; Sec. 24, note 1,) and such "menace" would not be an assault. 1 Ire. 125; 30 Ala. 14; 23 Texas, 574. In effect, therefore, the jury were charged that if the deceased had threatened defendant's life, and if at the time of the killing he had drawn his pistol for the purpose of putting his threat into execution, it would

State v. Stewart.

avail the defendant nothing in his defense. The defendant need not wait until he is assailed; he may defend himself, whenever as a reasonable man he believes an attempt is being made upon his life. 37 Cal. 676; 32 Iowa, 36; 8 Bush (Ky.) 481; 16 Ill. 17; 47 Mo. 604; 8 Mich. 150; 2 Bishop Crim. Law, Sec. 865; 17 Ala. 587. The defendant need not wait until he has evidence sufficient to convince; it is sufficient that he has reasonable cause to apprehend the threatened blow. 37 Cal. 676.

VII. The court should have granted a new trial upon the affidavit of the juror that he was induced to find the verdict upon the assurance and belief that the recommendation to mercy would in effect reduce the crime. 12 How. U. S. 361; *Crawford v. State*, 2 Yerg. 60.

Thomas Wells, for Respondent.

I. This is not a case in which one juror can, by his affidavit alone, be permitted to impeach his own and the verdict of eleven other jurors. The recommendation to mercy was mere surplusage. *People v. Lee*, 17 Cal. 76; *Castro v. Gill*, 5 Cal. 40; *Boyce v. Cal. Stage Co.*; 25 Cal. 460; *People v. Hughes*, 29 Cal. 257; *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 400.

II. Section 355, subdivision 5, of the Criminal Practice Act, provides that "When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the counsel for the people must open and must conclude the argument." The learned judge below decided this provision to mean that, if counsel for defendant in a criminal case wish to have counsel for the State confined to one argument only, he must announce the fact that defendant will submit the cause without argument as soon as the testimony is concluded, and not lead counsel for the State to believe he is going to argue the case until after

State v. Stewart.

the cause is merely opened for the State; and then, for the first time, decline argument. It seems to us this was a correct exposition of the spirit and intendment of the law.

III. There was no error in *reading* as part of the charge sections 18, 19, 20, 25, 26, and 27 of the Crimes Act. That portion of the charge was necessary to be given; for the defendant had admitted the killing, and set up that he did it in necessary self-defense. There being evidence tending to show an unprovoked, malicious, willful, deliberate and premeditated killing, taken in connection with this admission and plea of justification, it became necessary to define all the crimes covered by the indictment; and justifiable and excusable homicide as well. It made no difference that the judge *read* those sections *from the statutes*, instead of transcribing them and then reading the transcription. The statutory provision requiring charges and instructions to be in writing does not apply to the giving of statute law in charge to juries; it has strict reference to the charge of a court given in its own language, and not in the exact words of the *enacted statute*. *People v. Henderson*, 28 Cal. 465; *People v. Payne*, 8 Cal. 341.

IV. There was no error in making the addition, defining malice aforethought to the third instruction asked by defendant. The instruction as asked was scarcely admissible; it was vague and calculated to confuse the jury; and it was therefore the duty as well as the privilege of the court to add to and render it plain. *People v. Dodge*, 30 Cal. 448; 34 Cal. 48; 31 Cal. 357. Nor was there error in giving the instructions asked by the State, they being the same as those sustained by this court in *State v. Hall*, *ante* 58.

V. Defendant's first instruction was properly refused because it would have been, in effect, instructing that the jury might find from the evidence that threats, alone, without any attempt to execute them on the part of Durand,

justified defendant in killing him. Defendant's fourth instruction was subject to substantially the same objections; it would have led the jury to infer that, no matter what the real facts might have been in regard to danger, if defendant believed he was in danger, he had a right to kill Durand, whether Durand was making any attempt or not and without any demonstration, "sufficient to excite the fears of a reasonable person." Nor was this instruction pertinent, under the facts of this case. *People v. Moore*, 8 Cal. 90; *People v. Gatewood*, 20 Cal. 146; *People v. Williams*, 32 Cal. 280; *People v. Honshell*, 10 Cal. 83; 27 Cal. 572; 8 Cal. 390; 17 Cal. 316; 6 Cal. 405; 30 Cal. 312. Defendant's fifth instruction would have been in derogation of the constitutional provision that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Art. VI, Sec. 12. It would, in effect, have been saying to the jury, "the defendant has given some uncontradicted testimony, and that part of his evidence you ought to take as the undisputed truth." The uncorroborated testimony of an accomplice is not a sufficient showing of fact to justify a conviction of crime. Shall it be laid down as a rule of criminal jurisprudence that the uncontradicted testimony of an accused, on trial, ought to be taken as the truth?

By the Court, HAWLEY, J.:

Defendant was convicted of murder in the first degree. This appeal is from an order of the court refusing him a new trial. Frank Durand (deceased) was shot and instantly killed by defendant, in the Tent Saloon at Columbus, on the 4th day of May, 1873, about 11 o'clock P. M. He had just asked some parties in the saloon to take a drink, and at the time of receiving the fatal shot he was standing about six or eight feet from the counter, and eight or ten feet from the

State v. Stewart.

front door. Defendant was in the street. No words were spoken by either party. Defendant claimed that the shot was fired in self-defense.

The defendant testified that he had been informed that Durand had at different times, within a month prior to the homicide, frequently threatened his life. That on the night of the homicide, he (defendant) in company with one Thompson and others left Jellison's saloon, for the purpose of going to McDonald's saloon, to witness a game of cards. "As I got up," says defendant, "in front of the Tent Saloon, Thompson called out 'look! look! Johnny! Frank is going to shoot.' I was in the act of stepping upon the porch when the words were spoken by Thompson. I looked inside of the saloon at the instant and saw Frank Durand * * * facing the door in a stooping position, with his hand on his pistol, as I supposed. I drew and fired, and ran without waiting to see the effect of my shot." In addition to this statement of defendant, there was some testimony tending to show that when deceased fell, a pistol dropped from his side on the floor, and that "just before the shooting, Durand faced the door in a stooping position." A witness for the prosecution testified that within an hour before the homicide, Stewart and Durand were in the street, and that after some conversation about previous differences they "agreed to be friends." The testimony on the part of the prosecution tended to show that no one was present with defendant; that no remarks were made by any one; that no demonstrations were made by deceased, and that defendant's version of the homicide was a fabrication. In connection with this testimony, the numerous exceptions to the instructions of the court will be considered.

1. The court refused to give the following instruction asked by defendant: "Fourth. If you believe from the evidence, that shortly before the killing, the deceased threatened the defendant's life, and at the time the killing occurred

State v. Stewart.

defendant had reason to believe, and did believe, that deceased was about to put his threat into execution, then you must find the defendant not guilty." This refusal is assigned as error.

It was argued by counsel for the State that this instruction was properly refused because it was not pertinent under the facts. This position is untenable. The testimony was sufficient to authorize the giving of such instructions as were proper to present the question of justifiable homicide to the consideration of the jury. The court, however, was justified in refusing the instruction upon other grounds. The principle of law stated in the instruction, without qualification, is not correct. If the defendant could reasonably have avoided the difficulty without resorting to such extreme measures he should have done so.

The law of self-defense is founded on necessity, and in order to justify the taking of life upon this ground it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm; but it must also appear to the defendant's comprehension as a reasonable man, that to avoid such danger it was necessary for him to take the life of the deceased. Without this qualification the instruction was clearly erroneous. *State v. Ferguson*, ante 106; 2 Cooley's Blackstone, Book IV., p. 183; 1 Russ on Cr. 660-1; 2 Bishop on Criminal Law, Sec. 627 (544); *Logue v. Commonwealth*, 38 Penn. State, 268; Charge of Agnew J. in *Commonwealth v. Drum*, 58 Penn. State, 20; *U. S. v. Mingo*, 2 Curtis C. C. R. 5; *State v. Wells*, 1 Cox (N. J.) 430; *People v. Shorter*, 4 Barbour, 472-483; *People v. Hurley*, 8 Cal. 391; *Dupree v. State*, 33 Ala. 389. Moreover, the court gave the second instruction asked by defendant, which was as favorable for him as the testimony, viewed in any light, would warrant.

State v. Stewart.

2. The fifth instruction was properly refused. The jury had the right to believe such portions of defendant's testimony as they considered true, and to disbelieve such portions as they considered false. His testimony, like that of other witnesses, is to be weighed and determined by the jury from all the surrounding circumstances of the case—his demeanor on the witness stand, the probabilities of his testimony being true or untrue, taken in connection with the testimony of other witnesses deemed reliable. In short, "the credit to be given to his testimony" should be (where the statute places it) "left solely to the jury." Stats. 1867, 58; *People v. Cronin*, 34 Cal. 194.

3. It is claimed that the court erred in giving this instruction: "No threats or menaces made by the deceased against the defendant, John Stewart, can avail Stewart, unless he at the time of the killing was actually assailed, or had sufficient evidence to convince any reasonable person that he was in danger of incurring bodily injury or of losing his life at the hands of the deceased." The correctness of this instruction, as applied to the case of the *State v. Hall*, ante 58, from which it is copied, is admitted by counsel for defendant. But he contends that it was not proper under the testimony in this case. Although carelessly drawn, we think the instruction, considering all the testimony, was applicable and correct. Mere threats, unaccompanied by some demonstration of hostility from which the accused might reasonably infer the intention of their execution by deceased, would not justify the homicide. Nor would acts of hostility, however violent, of themselves excuse the slayer. There must be some overt acts or words at the time clearly indicative of a present purpose to do the injury. The defendant must show either that he was actually assailed or that he was menaced by the deceased at the time in such a manner as to induce him as a reasonable person to believe that he was in danger of his life or of re-

State v. Stewart.

ceiving great bodily harm. 2 Bish. Cr. Law, Sec. 651; *State v. Hall*, ante 58; *Bohannon v. Commonwealth*, 8 Bush, 488; *Rippy v. State*, 2 Head, 220; *People v. Lombard*, 17 Cal. 319; *Johnson v. State*, 27 Tex. 767; *People v. Scoggins*, 37 Cal. 683.

4. The court gave the following instruction asked by defendant's counsel: "Malice is a question of fact; and in this case the burden of proof lies upon the prosecution to satisfy the jury of the malice of the defendant. The jury ought not to presume that the defendant acted with malice unless they are satisfied it is just in this particular instance." In connection with this the court instructed the jury, "that malice aforethought of the statute means a wrongful act, done intentionally, and without legal cause or excuse." And it is contended that this modification is erroneous. The words, malice aforethought, mean malice previously and deliberately entertained. They refer to the state of defendant's mind anterior to, or at the time of, the homicide. If defendant intended to and did take the life of deceased without any just cause or excuse, then the law presumes that such an unlawful act was done with malice aforethought. "Malice," in its legal sense, "means a wrongful act, done intentionally, without just cause or excuse." Burrill's Law Dictionary; *State v. Decketts*, 19 Iowa, 448; *Warren v. State*, 4 Coldwell, 136; *Murphy v. State*, 30 Ind. 513; *Commonwealth v. York*, 9 Met. 104. No injury could possibly have resulted to defendant from this modification.

5. The bill of exceptions shows that the court read to the jury, as a part of the instructions in the case, "Sections 18, 19, 20, 25, 26, and 27 of the 'Act concerning crimes and punishments,' approved Nov. 26, 1861." (See Stats. 1861, 59, 60.) This is assigned as error. It is argued, first, that section 26 is inapplicable; second, that all the sections read should have been reduced to writing and delivered to the jury. Section 26 was clearly applicable. A bare fear that defendant is in danger of his life, or of receiving great bodily

harm, will not justify him in taking life. Where the defendant claims that he acted in self-defense, as well as in the other enumerated cases of justifiable homicide mentioned in section 25, "It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge."

Under the provisions of section 355, of the Criminal Practice Act, the instructions must be in writing. Oral instructions cannot be given except by the consent of the parties. But reading certain sections from the statute, is not giving oral instructions. If the court should have its entire charge printed it would, under well known rules of construction, be considered a compliance with the statute. The object of the statute was to require certainty, so that the exact language used by the judge in the court below might be presented to the appellate court. Was not this object accomplished by the specification, in the charge, of the sections read? What difference could it possibly make to the jury, (or to the defendant), whether the court read from the statutes, or copied the sections? Certainly none; unless it was error not to give the instructions to the jury when they retired to deliberate upon their verdict.

Section 393 of the act provides that the jury may take with them certain papers (therein specified), "and also the instructions of the court." (Stats. 1861, 477.) Whatever the rule, under this section, might be, if the jury requested the instructions, certain it is, that no error prejudicial to defendant could arise unless such a request was made and refused. It is usual and we think the better practice, for courts to copy such portions of the statute as are deemed applicable, and to deliver to the jury all the instructions given.

6. It appears from the bill of exceptions that the State was represented by two attorneys, the defendant by one.

State v. Stewart.

That when the evidence was concluded, the district attorney opened the case for the prosecution; and at the close of his argument, the attorney for defendant proposed to submit the case to the jury without further argument and objected to any further argument being made. This objection was overruled, and the associate of the district attorney was allowed to address the jury. It is claimed that this was erroneous. The statute provides that "when the evidence is concluded, unless the case is submitted to the jury on either side or on both sides, without argument, the counsel for the people must open and must conclude the argument." Stats. 1861, 472, Sec. 355. Either party may claim the privilege of addressing the jury, or of submitting the case without argument. If either party desired to submit the case without argument, it would be his or their duty, to make such a statement when the evidence was concluded. This would certainly be just and fair to the opposite counsel, giving him or them an opportunity to accede to such a proposal or to insist upon arguing the case. On the one hand, the counsel representing the State should, in case defendant's counsel insists upon argument, be required, if so desired by defendant's counsel, to open the case, stating the evidence and points to the jury, and citing the authorities to the court, upon which he relies for a conviction. On the other hand, the defendant's counsel should not be allowed to convey the idea that he intends to argue the case, until after the opening argument was concluded, and then by proposing to submit the case without further argument, deprive the State of the opportunity of presenting its case in as full and clear a light as it might and probably would have done if such a proposal had been made when the evidence was concluded, and the court then have decided that but one argument was admissible. The objection not being made at the proper time, we are of opinion that the question was within the discretion of the court, and the presumption

Davis v. Cook.

arises that it was properly exercised and that no error occurred.

7. The affidavit of Collins presents no question worthy of consideration. No juror should ever be allowed to impeach the verdict of the jury by testifying to his own misconduct, or by asserting his ignorance of the law. These principles are now too well settled to require discussion, or citation of authorities.

The recommendation to mercy constituted no part of the verdict, and should not have been recorded with it. *People v. Lee*, 17 Cal. 76.

The judgment of the district court and its order overruling defendant's motion for a new trial are affirmed, and the court is directed to fix a day for carrying the sentence into execution.

WHITMAN, C. J., did not participate in the foregoing decision.

E. S. DAVIS, RECEIVER OF THE FIRST NATIONAL BANK OF NEVADA, RESPONDENT, v. LEWIS COOK *et als.*, APPELLANTS.

REMOVAL OF SUIT TO FEDERAL COURT—JUDICIARY ACT OF 1789. To remove a suit from a state court to the United States circuit court under the judiciary act of congress of 1789 (1 U. S. Stats. 73, Sec. 12,) the application must be made by defendant at the time of entering his appearance in the state court; and if not then made, it will be too late.

REMOVAL OF SUIT UNDER ACT OF CONGRESS OF JULY 27, 1866. The act of congress of July 27, 1866, in reference to the removal of cases from state to federal courts (14 U. S. Stats. 306,) contemplates the case wherein a citizen of the state in which the suit is brought is or shall be a defendant, and has no application to a case where one defendant is an alien and the others are citizens of another state.

Davis v. Cook.

REMOVAL OF SUIT UNDER ACT OF CONGRESS OF MARCH 2, 1867. The act of congress of March 2, 1867, in reference to the removal of cases from state to federal courts (14 U. S. Stats. 558,) extends the right of removal to the plaintiff as well as to the defendant, when from prejudice or local influence either party reasonably believes he cannot obtain justice in the state court; but its phraseology excludes suits in which an alien may be a party.

CONSTRUCTION OF STATUTES "IN PARI MATERIA." Section 12 of the judiciary act of congress of 1789, and the acts of congress of July 27, 1866, and March 2, 1867, all relating to the removal of causes from state to federal courts, being *in pari materia*, must be construed together.

REMOVAL OF CASE TO FEDERAL COURT BY PART OF DEFENDANTS. If a suit be brought in a state court by a citizen against several joint debtors, and the only defendants served are not citizens, such defendants have the right to remove their case to a federal court, though their co-defendant do not join in the application.

CITIZENSHIP OF FIRST NATIONAL BANK OF NEVADA. The First National Bank of Nevada, having its location in Nevada, is a citizen of the State of Nevada.

INTOXICATION OF JUROR AVOIDS VERDICT. Though the moderate use of liquor by a jury, unless furnished by the prevailing party, does not constitute such misconduct as will vitiate their verdict; yet, if it appear that any one of the jurors while sitting as such used liquor to an intoxicating extent, the verdict will be set aside.

USE BY PARTNERSHIP OF PROPERTY OF ONE PARTNER. In a suit against two of three copartners on notes given by the third in the firm name for the purchase by him of a store-house, where the plaintiff was allowed to show that the store was afterwards used by the copartnership: *Held*, that defendants had the right to show that they allowed their copartner rent for it.

TAKING NOTE IN NAME OF FIRM FOR INDIVIDUAL DEBT WITH FULL KNOWLEDGE. If one of several partners give a note in the name of the firm for his individual indebtedness, and the payee has full knowledge thereof, the loss or disadvantage resulting to the payee does not constitute a sufficient consideration to maintain an action against the other partners.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

Davis v. Cook.

The facts are stated in the opinion. The notes sued on were dated in June, 1869; suit was commenced in December, 1870; and the judgment appealed from entered on June 7, 1872.

Mesick & Wood, for Appellants.

I. The case should have been transferred to the United States circuit court. 14 U. S. Stats. 306, 558; *Fiske v. Union Pacific R. R. Co.*, 6 Blatchford, 377; *Dennistown v. Draper*, 5 Blatchford, 336; *Meadow Valley Mining Co. v. Dodds*, 7 Nev. 143; *Stewart v. Mordecai*, 40 Ga. 1.

II. There was error in excluding proof by the witness Barnett that the First National Bank was in an insolvent condition, for about two months prior to October 6, 1869, when it suspended. The theory of the defense was that the notes were given, not in the business of Cook Brothers, but in the individual business of Lewis Cook and were taken by the bank with knowledge of that fact and therefore in fraud of the rights of the firm of Cook Brothers; and that Lewis Cook and not the firm, should be called on to pay them. Every circumstance then which could conduce to show the existence of this knowledge on the part of the bank was proper matter to go to the jury. Had the bank considered Cook Brothers justly liable for the payment of these notes, it would not have hesitated in its extreme necessities to present them to Cook Brothers for payment prior to its suspension.

III. There was error in rejecting the deposition of Isaac Cook. The theory of the plaintiff was that the stone store, though conveyed to Lewis Cook individually, was a purchase by the firm of Cook Brothers, and was their property and formed a part of the consideration of these notes, and in support of that theory he showed that the firm of Cook

Davis v. Cook.

Brothers occupied the store for their business. The deposition was clearly indispensable then to show that plaintiff's theory was wrong, and that the firm of Cook Brothers had no interest whatever in the property as purchasers and did not occupy it as owners.

IV. There was manifest error in giving instruction number fifteen for plaintiff. It informs the jury in effect that plaintiff can maintain this action against Cook Brothers provided any loss or disadvantage resulted to the bank, even though the transaction was had with Lewis Cook alone and for his individual benefit, and the bank knew such to be the character of the transaction.

V. There was error in refusing to grant a new trial upon the ground of misconduct of the jury, 1st, by receiving communications from outsiders in reference to the case under consideration; 2d, by receiving and drinking bottles of whisky; 3d, by getting drunk on the whisky, so as to unfit them for deliberation or for embodying their honest convictions, if they had any, in their verdict.

We do not contend that the mere drinking of liquor by the jurors vitiates the verdict; but we do insist that when jurors drink to such excess as to become intoxicated in the jury room and come reeling into court with their verdict, the fair inference is that they were in no better condition in the jury room; and that their verdict, rendered under such circumstances, is not the result of deliberation, but of a scandalous debauch. *Sacramento Co. v. Showers*, 6 Nev. 299; *Ryan, v. Harron*, 27 Iowa, 494; *Watson v. Walker*, 3 Foster, 471; *Walker v. Hunter* 17 Ga. 364; *Short v. West*, 30 Ind. 368; *Com. v. Ruby*, 12 Pick. 496.

Ellis & King, for Respondent.

I. The defendants did not bring themselves within the purview of any act of congress on the subject of removal of

Davis v. Cook.

cases from state to federal courts. The application was not filed until long after the appearance of the two contesting defendants, and hence the application for transfer does not come under the general rule of sec. 12 of the judiciary act of 1789, nor does it come under either the act of July 27, 1866, or the act of March 2, 1867. *Stewart v. Mordecai*, 40 Ga. 3; *Fisk v. U. P. R. R. Company*, 6 Blatchford, 377.

II. That which is alleged as misconduct upon the part of the jurymen—namely, the drinking of whisky while deliberating upon their verdict to any extent whatever is only supported by the affidavits of four jurymen. The impeachment by jurors of a verdict which they themselves rendered under the solemnity of an oath ought not to be tolerated. As to John A. Cook's affidavit, it is based entirely upon information from third parties, that the jury drank whisky, and is scarcely competent evidence upon which to set aside a verdict. See *State v. Jones & Nery*, 7 Nev. 434; 1 Term, 11; 1 Nev. 326; 4 Johns. 487; 5 Cowen, 106; 6 Cowen, 53; 1 Wendell, 297; 11 Vt. 1.

III. The court did not err in excluding the proof of the insolvent condition of the First National Bank. One of the notes had been due only about six weeks and the other only about five weeks before the suspension of the bank; and the mere fact that the payors had not been pressed for payment during that period certainly cannot create any presumption that defendants did not owe them. The testimony was totally irrelevant and immaterial.

IV. The exclusion of Isaac Cook's deposition was correct. Although the deed may have been in the name of Lewis Cook and really for his own use and benefit and so intended; yet if it were represented to be a partnership business and was consummated in the name of the copartnership, the copartnership would be bound. The transaction was in the scope of the partnership business; and a

Davis v. Cook.

part of the consideration of the notes at least (the stock of goods) was enjoyed and used by the partnership, and at the bank the whole transaction was understood to be for the partnership.

V. There was no error in the trial. The action was brought upon promissory notes confessedly executed by a member of the firm, whose name was signed to them in a line of business of the firm and, *prima facie*, within the scope of his authority. The user of the stock of merchandize as partnership property and the occupancy of the store for partnership purposes; the total failure to show that the bank had any knowledge that the transaction was an individual one, and not for the benefit of the firm though transacted in the firm name—all fully and completely sustain the action of the court below in all its rulings.

By the Court, BELKNAP, J.:

This is an action brought by the receiver of the First National Bank of Nevada against Lewis Cook, John A. Cook and Isaac Cook, comprising the firm of Cook Brothers, upon two promissory notes of the aggregate value of six thousand five hundred and eighty-seven $\frac{47}{100}$ dollars and interest, given in the partnership name to the bank. John A. and Isaac Cook entered their appearance and answered for themselves only. Service of summons was not made upon Lewis Cook. The answer alleges that the firm name was used by Lewis Cook in the purchase of certain merchandise and real estate for his individual benefit from one W. D. Ivers and the firm of Bruckman & Ivers. These parties, it is charged, were largely indebted to the plaintiff; and the notes in controversy were given to it in settlement thereof. It is also alleged that the officers of the bank had full knowledge of the transaction, and colluded and conspired

Davis v. Cook.

with Lewis Cook to cheat and defraud the defendants answering.

It appears that the firm of Cook Brothers were engaged in mercantile business at Hamilton, Nevada. Neither John A. nor Isaac Cook were residents of this State, and the management of the partnership business was confided to Lewis Cook. While thus conducting it and in the absence of his partners these notes were given. The action was brought in the District Court of the Eighth Judicial District, and after two mis-trials was transferred, by stipulation, to the Ninth Judicial District Court. The plaintiff recovered a judgment for the full amount prayed. From the judgment and an order denying a new trial this appeal is taken.

Before the trial in the State district court a motion was made to remove the cause to the circuit court of the United States, and in support thereof the following petition and affidavit were filed:

“ [Title and venue.]

“To the Honorable District Court of the Eighth Judicial District of the State of Nevada, County of White Pine.

“The petition of John A. Cook and Isaac Cook, the defendants served and appearing in the above entitled action, respectfully represent: that the above cause was brought and is now pending in the said district court; that at the time the same was brought said plaintiff was and still is a resident and citizen of the State of Nevada, and the said defendants John A. Cook and Isaac Cook were and still are residents of the state of California; that the defendant Isaac Cook was at the time of bringing said suit and still is a resident and citizen of the state of California; that at the time of bringing said suit the defendant John A. Cook was and still is an alien, born without the United States, and has never been naturalized as a citizen thereof: and that the defendant Lewis Cook has never been served nor appeared in

this action and is a non-resident of the State of Nevada, and not a citizen thereof; that the amount in controversy exceeds the sum of five hundred dollars, exclusive of costs; that your petitioners have made and herewith file the affidavit of John A. Cook, stating that they have reason to believe and do believe that from local prejudice and influence they will be unable to obtain justice in this Honorable Court. And your petitioners herewith offer surety that they will enter into the circuit court of the United States for the district on the first day of its session and the term next ensuing certified copies of all process, pleadings, depositions, testimony and other proceedings in said cause, and will appear therein and litigate the controversy commenced hereby. Wherefore your petitioners pray that in pursuance of the acts of Congress of the United States, in such cases made and provided, that said suit may be removed by the order of this Honorable Court into the next circuit court of the United States to be held within and for the District of Nevada, and that this Honorable Court proceed no further as to the defendants appearing herein, nor either of them."

The petition was signed by the attorney of the answering defendants and verified by the affidavit of John A. Cook. It is accompanied by a further affidavit of John A. Cook alleging his alienage; that Isaac Cook is a citizen of the state of California; that the amount in controversy exceeds the sum of five hundred dollars, exclusive of costs, and "that said defendants have reason to believe and do believe that from prejudice and local influence the defendants will not be able to obtain justice in the said State court." The requisite surety for entering certified copies of all process, etc., in the United States circuit court was also offered. The district court refused to remove the cause, and its ruling is assigned as error.

The acts of Congress conferring the right of removal of causes from state to federal courts, by reason of the citizen-

ship or alienage of a party, are the judiciary act of 1789, the act of July 27, 1866, and that of March 2, 1867. Section twelve of the judiciary act of 1789 provides for the removal of suits commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, in which the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs. In such case application for removal must be made by the defendant at the time of entering his appearance in the state court. It is clear that this cause could not have been removed under the provisions of the judiciary act, since the application was made after answering.

Under section twelve of the judiciary act it was held in equity cases where some of the parties were and others were not liable to be sued in the circuit court of the United States, the proper parties could remove the cause as to themselves in cases where a distinct and separate interest vested and substantial justice could be done without affecting their co-defendants. A different rule, however, prevailed at law, and unless all of the defendants joined in the application for removal, and all were citizens of some other state or states, the application was denied. The evident purpose of the act of July 27, 1866, was to relieve foreign defendants from their disability to remove suits when joined with citizen defendants in cases where a final determination of the controversy could be had without the presence of their co-defendants, who desired to remain in the state court or of whom the circuit court of the United States could not have jurisdiction. The act provides, "that if in any suit already commenced, or that may hereafter be commenced, in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, a citizen of the state in which

Davis v. Cook.

the suit is brought is or shall be a defendant; and if the suit, so far as it relates to the alien defendant or to the defendant who is a citizen of a state other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then and in every such case the alien defendant, or the defendant who is a citizen of a state other than that in which the suit is brought, may, at any time before the trial or final hearing," have the cause removed to the circuit court of the United States. This act contemplates the case wherein "a citizen of the state in which the suit is brought is or shall be a defendant," and consequently has no application to the case at bar in which two of the defendants are citizens of the state of California, and the remaining defendant is an alien.

The act of March 2, 1867, provides that in a suit brought in a state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the amount in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he will file an affidavit stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such state court and comply with other statutory requirements the case shall be removed to the United States circuit court. This act is amendatory of that of 1866. It extends the right of removal to the plaintiff as well as the defendant when from prejudice or local influence either party reasonably believes that he cannot obtain justice in the state court. The phraseology of the statute excludes suits to which an alien may be a party.

Section twelve of the judiciary act and the acts of 1866 and 1867 being *in pari materia* must be construed together.

Davis v. Cook.

The first two acts include cases to which an alien may be a party; but the act of 1867 by its terms provides for suits between "a citizen of the state in which the suit is brought and a citizen of another state." *Expressio unius est exclusio alterius*. And in analogy to the judicial construction of section twelve of the judiciary act this cause could not have been removed as to the defendant Cook, the citizen of California, even though there could have been a final determination of the controversy as to him without the presence of either of his co-defendants. But the defendants John A. and Isaac Cook could have removed the cause to the circuit court of the United States upon entering their appearance for that purpose, before answering, under the twelfth section of the judiciary act notwithstanding their co-defendant Lewis Cook did not join them in the application. Under the practice act of this State in actions against defendants jointly indebted the plaintiff may proceed against the defendants served with process, and if he recover judgment it may be enforced against the joint property of all and the separate property of the defendants served. *Vandevoort v. Palmer, Cook & Co.*, 4 Duer. 677. The plaintiff having elected to proceed against the defendants served, they could not have been deprived of the right of removal from the failure of the plaintiff to serve Lewis Cook, against whom it may not have been intended to have proceeded.

It is urged by respondent in justification of the ruling of the district court upon defendants' motion for removal that as the First National Bank of Nevada was incorporated under an act of the congress of the United States it is a citizen of the United States, and cannot be treated as a citizen of this State for jurisdictional purposes. This question was thoroughly investigated by Judge Blatchford in the case of the *Manufacturers' National Bank v. Baack*, reported in 2 Abb. U. S. Reports, 232. The various provisions, in respect to the "location" of banking associations

Davis v. Cook.

incorporated under the act of congress of June 3, 1864, entitled, "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," are there discussed. By the sixth section of the act it is provided that the persons uniting to form a banking association under the act shall specify in an organization certificate the place where its operations of discount and deposit are, to be carried on, designating the state, territory or district, and also the particular county and city, town or village. And by the eighth section it is provided that its usual business shall be transacted at an office or banking house located at the place specified in its organization certificate. The ninth section provides that the affairs of such banking association shall be managed by a board of directors, at least three-fourths of whom shall have resided in the state, territory or district in which such association is located one year next preceding their election as directors, and be residents of the same during their continuance in office. Further sections speak of the place where the association is "located" and "established." "It is quite apparent from all of these statutory provisions," says Judge Blatchford, "that congress regards a national banking association as being 'located' at the place specified in its organization certificate. If such place is a place in a state, the association is located in the state. It is, indeed, located at but one place in the state; but when it is so located, it is regarded as located in the state. The requirement that at least three-fourths of the directors of the association shall be residents, during their continuance in office, in the state in which the association is located, especially indicates an intention on the part of congress to regard the association as belonging to such state. Three-fourths of the legal representatives of the unknown associates forming the corporation, with which representatives any person dealing with the corporation must deal, are

Davis v. Cook.

required to reside in the State where the corporation is 'located.'" A corporation existing by virtue of an act of the Congress of the United States must be considered a citizen of the United States. But a citizen of the United States resident in any state in the Union is a citizen of that state. *Gaines v. Ballou*, 6 Pet. 761. The residence of the National Bank being in Nevada it follows that it is a citizen of Nevada. The motion to remove the cause to the federal court was properly denied.

Misconduct of the jury is also assigned as a reason why a new trial should have been granted. The misconduct consisted, in part, of the receipt by members of the jury of communications intended to influence their deliberations from persons without the jury-room. The fact of the receipt of the notes was properly reported to the district court by the foreman of the jury and in its presence upon delivering the verdict. One of these communications, addressed to a jurymen, was preserved and is set forth in the record. It reads: "I want you to do all you can for defendants and come to a decision. FRANK." The others, presumably of the same character, were destroyed. So flagrant an attempt to corrupt the administration of justice deserves the severest censure. It became the duty of the court upon receiving the information to promptly investigate the charges and to check such practices by exemplary punishment of the guilty parties.

Further misconduct is shown by the uncontradicted affidavit of John A. Cook, wherein he says "that when the verdict of the jury was returned into the court-room on the morning of the 5th of June one of the jurors was intoxicated." In some of the states of this Union the use of spirituous liquors by the jury without the permission of the court will avoid the verdict, but in this and other states the rule has been so far modified that the moderate use of liquors unless furnished by the prevailing party does not

Davis v. Cook.

constitute such misconduct as will vitiate the verdict. No court, however, should hesitate to set aside a verdict formed by a jury any one of whom has, during the performance of his duties, used liquor to an intoxicating extent. Although it requires but three-fourths of their number to agree upon a verdict, the correct administration of justice demands the exercise of the cool, unclouded and sober judgment of the twelve men who are selected to investigate the facts at issue. In vindication of the character of courts and the purity of jury trials a verdict participated in by a jurymen with passions inflamed and reason impaired by ardent spirits should not be allowed to stand. Trial by jury, regarded by our ancestors as the principal bulwark of their liberties and the glory of the English law, would degenerate into a mockery of justice if verdicts were capriciously determined by intoxicated jurors. The judgment must be reversed.

The remaining errors to which our attention has been directed by counsel are:

First. The refusal of the court to admit in evidence the deposition of Isaac Cook, to the effect that himself and John A. Cook, of the firm of Cook Brothers, allowed their partner rent for the store purchased of Ivers. The plaintiff had shown that the real estate for which, in part, the notes in suit were given, was used as a store by the defendants subsequent to its conveyance to Lewis Cook. If this evidence was admissible, the defendants Isaac and John A. Cook were entitled to explain their relation to the property.

Second. Allowing the fifteenth instruction asked by the plaintiff. It reads: "The jury are instructed that, if by reason of the transaction that induced the execution of the notes sued upon in this action, any benefit accrued to the defendants, or any loss or disadvantage resulted to the First National Bank of Nevada, then there was a sufficient consideration for said notes to maintain this action."

Sherman v. Shaw.

This instruction ignores the defendant's theory, which is, that the notes in question were given by Lewis Cook for his individual indebtedness with knowledge thereof on the part of the payee. In such case loss or disadvantage must have resulted to the First National Bank of Nevada, but such loss does not constitute a sufficient consideration to maintain this action. In excluding evidence upon the question of the financial condition of the bank addressed to the witness Barnett, and in giving the seventh and tenth instructions asked by plaintiff, and refusing the tenth instruction asked by defendants, we see no error.

Judgment reversed and cause remanded for new trial.

HAWLEY, J., having been of counsel for defendants, was disqualified, and did not participate in the foregoing decision.

FRANK SHERMAN, RESPONDENT, v. GEORGE W. SHAW, APPELLANT.

NEW TRIAL STATEMENT FOR INSUFFICIENCY OF EVIDENCE SHOULD SHOW ALL THE EVIDENCE. On appeal from an order overruling a motion for new trial, based upon alleged insufficiency of the evidence to justify the verdict, the statement will not be considered unless it affirmatively shows that it contains all the material evidence produced at the trial.

APPEALS—OBJECTIONS TO RULINGS AT TRIAL TO BE ASSIGNED AS ERRORS.

an objection against a ruling of the court in refusing to strike out certain testimony is not specified in the assignment of errors, it will not be considered on appeal.

ASSIGNMENT OF ERRORS MUST SPECIFY PARTICULAR ERRORS. An assignment of "errors of the court in admitting the testimony excepted to by the defendant," as contained in the statement, is entirely too general.

APPEAL from the District Court of the Third Judicial District, Lyon County.

Sherman v. Shaw.

This was an action against the sheriff of Lyon County for alleged conversion of a quantity of cord-wood and a number of oxen and other animals, of the aggregate value of eighteen hundred dollars. The property had been seized by the defendant in his capacity of sheriff, on a writ of attachment, issued in a suit of *Peter Klein v. Jacob Gugger*, then pending in the Third District Court. The cause was tried before a jury, which rendered a verdict in favor of plaintiff and assessed the value of the property at \$1800. Judgment was entered accordingly. The defendant moved for a new trial, and commenced his statement on said motion as follows :

“The following is a statement of so much of the testimony as is necessary to explain the errors on which defendant will rely in support of his motion for a new trial of the above entitled cause. The following witnesses, after being duly sworn, testified as follows.”

After giving the testimony of various witnesses, the statement closed as follows :

“The pleadings and documentary evidence on file are hereby referred to and made a part of this statement, and also the instructions given by the court of its own motion and at the instance of the plaintiff, which were duly excepted to by the defendant.

“Errors of law, occurring on the trial and excepted to by the defendant, in this : The following is a specification of the errors upon which the defendant will rely in support of his motion for a new trial: 1st. The error/ of the court in admitting the testimony excepted to by the defendant, for the reasons hereinbefore set forth; and, 2d. That the court erred in giving the first instruction asked by the plaintiff, the same not correctly stating the law, being inapplicable to the case at bar, and calculated to mislead the jury on the question of what is sufficient delivery of personal property in order to perfect the title of the vendee as

Sherman v. Shaw.

against the creditors of the vendor, and that the court also erred in giving the instruction given by the court of its own motion, for the same reason last mentioned.

"2d. Insufficiency of the evidence to justify the verdict of the jury and the judgment, and that the same are against law in this: 1st. That the evidence showed that there was no such delivery and change of possession of the property in dispute, mentioned in the bill of sale, as is by law required to perfect the title to said property as against the creditors of the vendor. 2d. That the evidence shows that the pretended sale of said property was made for the purpose of hindering, delaying and defrauding the creditors of the vendor, and that the vendee was in collusion with the vendor in such attempt to hinder, delay and defraud such creditors.

"3d. That the evidence showed that the wood attached was hauled by the teams of Gugger, driven by a man in his employ, under contract made by him to haul on shares, and which wood belonged to him, or at that time he had an attachable interest therein."

The motion for new trial having been overruled, defendant appealed from the order and from the judgment.

Clayton & Davis, for Appellant.

No brief on file.

R. S. Mesick, for Respondent.

I. The order denying a new trial cannot be disturbed, inasmuch as the transcript shows no available specification of error committed by the court below, nor any error committed, nor any injustice or illegality in the verdict. As to the errors attempted to be assigned, the first is too general to be available. *Caldwell v. Greely*, 5 Nev. 258; *Corbett v. Job*, 5 Nev. 201; *People v. Central Pacific R. R. Co.*, 43 Cal. 422. And besides, there is nothing in the transcript to

Sherman v. Shaw.

which the assignment can apply; for there is no exception or objection shown to the admission of any testimony. There is only one exception shown in the transcript, and that is to the denial of a motion to strike out evidence after it had been admitted without objection. The acts of striking out evidence, and of admitting it, are totally different.

II. The point that the evidence was insufficient to justify the verdict, can not be considered, for the reason that it is in no way shown that the statement contains all the material evidence before the jury upon which the verdict was found. *State v. Bond*, 2 Nev. 265; *Sherwood v. Sissa*, 5 Nev. 349; *Bowker v. Goodwin*, 7 Nev. 135; *State v. Parsons*, 7 Nev. 58; *Caples v. Central Pacific R. R. Co.*, 6 Nev. 265.

By the Court, HAWLEY, J.:

The statement on motion for new trial does not show that it contains all the evidence. This Court has frequently and uniformly held that when the motion for a new trial is based, as in the present case, upon the insufficiency of the evidence to justify the verdict, the statement will not be considered unless it affirmatively shows that it contains all the material evidence produced at the trial. This rule of practice has been established so long, and affirmed so often, that it should not again be questioned.

The objection urged against the ruling of the court in not striking out the testimony of the witness Boutin will not be considered, because it is not specified in the assignment of errors. The assignment of "error of the court in admitting the testimony excepted to by the defendant" as contained in the statement, is entirely too general. The appellant must specify the *particular* errors upon which he relies.

Menzies v. Kennedy.

"If no such specifications be made, the statement *shall be disregarded*." Stats. 1869, 227, Sec. 197; *Corbett v. Job*, 5 Nev. 205; *Caldwell v. Greely*, 5 Nev. 260.

It is as unsatisfactory to the Court, as it is to counsel, to have cases disposed of upon mere questions of practice. But it must be remembered, that the rules of practice are as obligatory upon us as upon the parties to a suit; and if attorneys desire to have their cases examined upon the merits, they must comply with the plain provisions of the statute, and the rules of practice as established by the Court.

The judgment and order denying a new trial are affirmed.

THOMAS MENZIES, RESPONDENT, v. P. J. KENNEDY,
APPELLANT.

APPELLANT MUST SHOW INJURY. Where, though the evidence is very conflicting, there is substantial testimony to sustain the verdict, and the law touching the different theories of the losing party is fairly stated in the charge of the court, the verdict and judgment will not be disturbed.

WRITTEN INSTRUMENT NOT TO BE VARIED BY PAROL. Oral testimony, offered with evident intention of varying and controlling the plain terms of a written instrument, and not to establish an equity superior to the writing, is not admissible.

EXCLUSION OF EVIDENCE AFTERWARDS ADMITTED. The exclusion of testimony at one stage of a trial cannot be availed of as error, if it appear that afterwards the desired evidence all came in.

DAMAGES FOR CONVERSION OF STOCK—IMMATERIAL ERROR. In a suit for conversion of mining stock: *Held*, that though it was error to charge the jury that plaintiff was entitled to recover the highest market value of the stock between the time of demand and the commencement of the action; yet, if it appeared that the jury, notwithstanding the charge, gave the lowest instead of the highest price, the error in the charge was immaterial.

Menzies v. Kennedy.

CHARGING A FACT WITH A PRECEDING "IF." Where in a suit for the conversion of mining stock the court, in instructing the jury, used the language, "If the plaintiff consented to place his stock in the original pool, which pool was subsequently broken up," etc.; and it was objected that this was charging as a fact that the pool was broken up: *Held*, that the word "which" as there used was dependent on a *if* to be supplied and should be understood as if, instead of "which" the words "and if that" had been employed.

STATING TO JURY A FACT NOT CONTROVERTED. There is no error in stating to the jury as a fact a circumstance that is testified to by both parties, and about which there is no controversy.

SEPARATION OF JURY WITHOUT OBJECTION. Where on the trial of a civil case the court, in the presence of the parties and their attorneys and without objection from any one, allowed the jury to separate during recess: *Held*, that the consent of all parties must be implied and that, in the absence of any showing of harm, the verdict would not be disturbed.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action to recover the value of two hundred and fifty shares of the capital stock of the Lady Bryan Mining Company, claimed to have been sold to plaintiff by defendant, but left in defendant's possession and afterwards converted by him. It appears that the sale took place in May, 1871, and that the defendant gave the plaintiff at the time the following paper:—

"VIRGINIA CITY, May 13, 1871.

"Received from Mr. Menzies five hundred dollars for two hundred and fifty shares of the capital stock of the Lady Bryan M. Co., which said shares are to be retained by me and sold for the benefit of said Mr. Menzies, and the proceeds accounted for to him; or in case the same or a part of said shares cannot be sold within a reasonable time, then the same are to be delivered to him.

"\$500.

"P. J. KENNEDY.

"[Revenue stamp, canceled]."

Menzies v. Kennedy.

The defendant claimed that the plaintiff, instead of buying so much stock as indicated in the foregoing paper, bought in fact only an interest in a pool, made up by certain parties, among whom were the defendant, John Mallon, William Sharon, J. P. Jones, Thomas Sunderland and F. A. Tritle, for the purpose of holding and disposing of the entire stock of the Lady Bryan Mining Company on joint account. He alleged that the paper, though signed by him, was in part executed by him for the persons forming the pool, and that plaintiff so understood the transaction. The plaintiff on the other hand claimed that he did not buy an interest in a pool or look to any one except defendant to carry out the agreement made by him; that it was true the stock had been put into a pool but he had no connection with it or any of the parties to it except defendant, and that, if defendant in giving him the paper was acting as an agent, it was without his knowledge.

It further appeared that the stock, amounting in all to eighteen thousand shares, was put upon the market; but that only about five thousand shares were sold. These sales took place in May, June and July, 1871; but nothing further was done with the remainder of the stock until April, 1872, when it is alleged a new pool was formed and the remainder sold. In the latter part of the same month plaintiff demanded his stock of defendant; and afterwards, on account of non-delivery to him, commenced this action.

On the trial in the court below, the defendant being on the witness stand, his counsel propounded to him the following question, "Did you ever sell any Lady Bryan stock to the plaintiff?" The plaintiff objected to the question on the ground that the testimony sought to be adduced tended to vary the written instrument above given. The court sustained the objection and defendant excepted. Also, the following question, "Did you ever have in your possession any of the stock mentioned in this receipt?" to which the

Menzies v. Kennedy.

same objection was interposed, with the same result. Defendant also offered to prove by John Mallon that the pool first above referred to was owned jointly by the plaintiff and others; that no particular stock was owned by any one, and that the receipt merely specified the interest of the plaintiff in the whole. To this proposed testimony plaintiff objected; the objection was sustained, and defendant excepted.

In addition to the instruction, copied in the opinion, the court below also gave the following: "If the plaintiff consented to place his stock in the original pool, which pool was subsequently broken up, this fact of itself was no authority to defendant to place plaintiff's stock in any other pool than that which was made at the time of the contract. And if defendant without plaintiff's knowledge or consent used the plaintiff's stock to form another pool on or about the 22d day of April last and for that reason refused to deliver the stock to plaintiff, that would amount to a conversion of the stock; and plaintiff would be entitled to recover." It further appeared that while the case was on trial the jury were allowed to separate during a recess of about an hour; but that when the court made the order allowing the separation defendant and his counsel were present and made no objection.

There was a verdict and judgment in favor of plaintiff for sixteen hundred and twenty-five dollars and costs. Defendant moved for a new trial, which was overruled, and he then appealed from the order and judgment.

Mesick & Wood, for Appellant.

I. The plaintiff is not entitled to maintain the action. At the time of the delivery to him of the instrument, he became a member of the pool association and purchased and held his stock as one of said association, for whom defendant acted as agent. The affairs of that association are still unsettled, and all that the plaintiff can do is to call for an

Menzies v. Kennedy.

accounting and bring his action to have the affairs of the association settled.

II. The shares belonging to plaintiff had been sold prior to his demand. It clearly appears that of the 18,000 shares originally held at least 4000 were sold according to the original agreement; and of those a portion of plaintiff's must have been disposed of. So far as they were concerned, plaintiff certainly was not entitled to recover any more than the amount which defendant may have received for them; and he cannot recover that in this case, because no accounting has been had. It also appears that the whole of plaintiff's stock was sold before any demand. It may be contended, perhaps, that this last sale was not made in a reasonable time; but when it is considered that the operation embraced a large quantity of stock, that an entire mine was to be floated on the market, plaintiff must be held to have known this and to have consented that his interest should fare with the others. Under these circumstances one year was not an unreasonable time. And defendant had the right to consider that he was not exceeding his authority from plaintiff's own conduct in not, during that time, making any demand.

III. There was error in sustaining the objections to the question as to whether defendant ever had or sold any of the stock mentioned in the receipt and in refusing to allow defendant to show by John Mallon the object and purpose of the receipt. The object sought was plain. It was merely to show that defendant never had in reality any of this stock, and that the entire transaction was a sale to plaintiff of an interest in the pool, and not of any particular shares; in short to show the objects and purposes of the parties in executing the instrument. *Pierce v. Robinson*, 13 Cal. 116.

IV. There was error in the instruction that plaintiff was entitled to "recover the highest market value of the stock

Menzies v. Kennedy.

from the time of demand until the commencement of this action." *Boylan v. Huguet*, 8 Nev. 345. Also in the instruction that the original pool was broken up and that such fact alone was no authority to defendant to place plaintiff's stock in a new pool, and that if he did so it would amount to conversion. The fact of the breaking up of the first pool was a question in the case and for the jury to decide.

V. There was error in allowing the jury to separate without consent of defendant. The statute plainly requires something more than a failure to object; it requires consent. Practice Act, Sec. 162; 3 Day, 289.

Lewis & Deal, for Respondent.

I. The contract set out in the record was the contract of the defendant Kennedy. There is nothing in the instrument showing that he was acting as an agent; and all the evidence, drawn out with the object of showing that he was acting as agent and not as principal, should not have been received. But admitting it to be true, it would not entitle defendant to a judgment. The rule in regard to written contracts is well established, that in order to bind a principal the instrument must purport on its face to be the contract of the principal and his name must be inserted in it and signed by it. Story on Agency, Secs. 147, 269, 270; *Haskell v. Cornish*, 13 Cal. 45; *McDonald v. Bear River Company*, 13 Cal. 220; *Shaver v. Ocean N'g Co.*, 21 Cal. 45; *Gillig, Mott & Co. v. The Lake Bigler Road Company*, 2 Nev. 219.

II. Under the contract defendant had no authority to make any disposition of the stock except as provided by the terms of the contract. That was to sell the whole or part of the stock within a reasonable time or return it to respondent, if not sold. Did he sell any part of it? Both defendant and Mallon testified that after four thousand shares of the original pool were sold, no more was disposed of until the

Menzies v. Kennedy.

new pool was formed; and that after such sale and before the new pool was formed plaintiff was offered his shares, but did not get them for the reason that he did not have his receipt with him at the time.

III. The evidence attempted to be elicited by the questions asked the defendant and Mallon was inadmissible; but, if it was error to exclude the questions, the record shows that they were afterwards fully answered by the witnesses. Everything in any way relating to the transaction went before the jury.

IV. There was no injury to appellant in the instruction of the court as to the measure of damages. The only testimony as to the value of the stock was given by plaintiff's witnesses, who fixed it at \$6 50 per share in gold coin on April 25, 1872, the day on which the demand was made, and that was the value of it fixed by the jury. See *Boylan v. Huguet*, 8 Nev. 345; *Tompkins v. Mahoney*, 32 Cal. 231.

V. The language of the instruction that "if the plaintiff consented to place his stock in the original pool, which pool was subsequently broken up," simply meant "if the plaintiff consented to place his stock in the original pool and if that pool was subsequently broken up." But even if appellant's construction be placed upon the language there was no error, because there was no controversy upon this point at the trial.

VI. The statute in reference to juries is not any more strict than was the rule before the adoption of the statute; and in no case has it been held that the separation of the jury in a civil case was an irregularity for which a new trial would be granted, unless the moving party showed affirmatively that he had suffered injury. *Cannon v. The State*, 3 Texas, 31; *Welch v. Welch*, 9 Rich. 33; *Burns v. Paine*, 8 Texas, 159. But in this case it must be implied from the circumstances that defendant consented to the separation of the jury during the recess. Both he and his attorney were

Menzies v. Kennedy.

present when the court made the order permitting the jury to separate; it was made with their knowledge; they sat by silent and raised no objection until the motion for new trial was filed. It would be unjust to grant a new trial for an irregularity that might have been presented by the party who now seeks to take advantage of it. *Stix & Co. v. Pump & Co.*, 37 Ga. 334; *Martin v. Tidwell*, 36 Ga. 345; *Riggins v. Brown*, 12 Ga. 371; *Brandon v. Graniss*, 1 Conn. 401; *Dawner v. Baxter*, 30 Ver. 474.

By the Court, WHITMAN, C J.:

The first and second points of appellant, claiming the evidence to be insufficient to warrant the verdict, must fail for the reason that there was a conflict of evidence, and therein substantial testimony to sustain the verdict. The law, touching the different theories of appellant and respondent, was fairly stated, and the jury found for the latter. Of course a verdict so found must stand, there being no other error.

The court did not err in refusing to allow the witness Mallon and the appellant to answer the questions stated in appellant's third point; their evident object was to vary and control a written instrument. The cases of *Pierce v. Robinson*, 13 Cal. 116, and others analogous, are not in point; in such, oral testimony has been allowed to establish an equity superior to the writing; here there was no such pretense. Again, if the ruling was error, it was cured; because at another stage of the trial, the desired evidence came in; the record shows that all the parties to the contract, or having knowledge thereof, told all they wished about it.

The court erred in charging the jury thus. If you believe from the evidence that the defendant did not sell said stock, and after a demand made for the delivery of said stock by the plaintiff the defendant failed or refused to deliver to the plaintiff the stock, plaintiff is entitled to recover the highest

Menzies v. Kennedy.

market value of the stock from the time of demand until the commencement of this action.

The measure of damages was incorrect. *Boylan v. Huguet*, 8 Nev. 345. But as the testimony fixes only two prices for the stock, six dollars and a half at the date of appellant's demand and nine dollars at a subsequent period, and the jury despite the instruction gave the lowest instead of the highest price, the error becomes immaterial. Had the jury given the higher sum, there being no other error an appellate court would require a reduction of the amount of the verdict to correspond to the law and the facts, else a new trial. That reduction is already an accomplished fact, from the original action of the jury; hence there is no purpose in disturbing the verdict. The law given was wrong, and the jury disobeyed it; the appellant did not suffer thereby.

It is objected to the language of the court in the instruction to follow, that it finds a fact, namely the breaking up of the original pool. This is the instruction: "If the plaintiff consented to place his stock in the original pool, *which pool was subsequently broken up* * *." The portion objected to is underscored for the purpose of reference. The construction sought is a forced reading; the words "which pool," &c., are dependent on an *if* to be supplied, and should be understood precisely as if the words "and if that" or others synonymous, were written instead of "which." That is the obvious meaning of the court; but if not, the fact was not one in controversy, being testified to by both sides, and might as well have been stated to the jury as if admitted by the pleadings.

It is claimed that the jury was allowed to separate without consent of the parties to the action. The order of the court giving this permission was made in presence of the attorneys for either side, without objection. In so doing the court followed a custom so well recognized that the consent of the parties must be implied, in absence of any objection. It is

Blasdel v. Williams.

not pretended that any harm came to appellant by reason of this irregularity, if under the circumstances it can be so considered; and it would be unusual practice to reverse a case upon the mere fact of separation under permission from the court.

In the case of *Nicolls v. Whiting*, quoted as authority for the direction given the jury in *Lester v. Stanly*, cited by appellant (3 Day, 287), the separation was violent and against the express direction of the court. This case is not treated as authority by the supreme court of errors of the state where rendered; or else is not held to be in point on the present proposition. *State v. Babcock*, 1 Conn. 401.

The order and judgment of the district court are without error and are hereby affirmed.

H. G. BLASDEL *et al.*, RESPONDENTS, v. HENRY WILLIAMS, APPELLANT.

ACTION TO QUIET TITLE—PRIMA FACIE CASE FOR PLAINTIFF—BURDEN OF PROOF.

In an action to quiet title under section 256 of the Practice Act, where the allegations of the complaint, except that of adverse claim, are denied, mere proof of possession or title with possession does not make out a *prima facie* case or throw the burden of proof on defendant to produce his claim; and a judgment for plaintiff in such case, with no evidence of the fact of an adverse claim by defendant, is erroneous.

PRACTICE ACT, SEC. 256. The possession of real property is the base upon which an action to quiet title under section 256 of the Practice Act is founded; but it cannot be said that an admission or proof of the mere fact, which gives the right of action, establishes *prima facie* the cause of action.

PLEADING OF FACTS IN ACTION TO QUIET TITLE. In a complaint to quiet title it is not correct pleading to merely allege in general terms an adverse claim by defendant, its invalidity and that it is prejudicial to plaintiff, as that is a pleading of conclusions and not of facts; but such a complaint, though defective, is sufficient, in the absence of a demurrer, as an attempt to state a cause of action.

Blasdel v. Williams.

IN ACTION TO QUIET TITLE PLAINTIFF MUST SHOW ADVERSE CLAIM. In an action to quiet title the plaintiff is as in other cases the actor ; and, as the cause of action is the assertion by defendant of a claim to his prejudice, it devolves upon him to show such assertion of claim and that it is prejudicial to him, before the defendant can be called upon to move.

APPEAL from the District Court of the Third Judicial District, Esmeralda County.

This was an action brought by H. G. Blasdel and A. J. Pope to quiet their title to certain lodes or ledges of gold and silver bearing quartz, known as the Dolores, Potosi, Grant, Ætna, and Empire lodes, respectively, in the Wilson Mining District, Esmeralda County. The complaint, after alleging that plaintiffs have legal title and are the owners and in possession of the property, avers that defendant "claims an estate and interest in said real property adverse to the plaintiffs' right and a cloud upon their title; that said defendant has no legal interest or estate in said real property or any part thereof, or valid claim or title thereto; on the contrary defendant's claim is without right whatever and void," and closed with a prayer "that the defendant be required to exhibit and show the nature of his claim; and that the estate and interest claimed by said defendant be determined by the decree of this court, and declared and adjudged void and of no effect; and that the right and title of said plaintiffs be adjudged and decreed good and valid as against said defendant and for the costs of this action."

The answer "denies that plaintiffs have legal title or are the owners of or in the possession or entitled to the possession of the property mentioned and described in said complaint, or any part thereof; and denies that any claim of defendant to an estate or interest in said property, or any part thereof, is any injury to plaintiffs' right or cloud upon their title. Defendant further denies that he has no legal interest or estate in said property, or any part thereof, or

Blasdel v. Williams.

valid claim or title thereto, or that his claim is without right or void."

On the hearing plaintiffs introduced proof of possession and made some proof of title and then rested. The defendant introduced no evidence and submitted the case upon the claim that the proofs made were insufficient to maintain the action. The court below decided in favor of plaintiffs and signed findings, presenting as facts in the case, among other things, that the estate and interest claimed by defendant in the property described were a cloud upon plaintiffs' title and had no validity, but were destitute of right and void. Judgment for plaintiffs was entered in accordance with the findings; and a motion for new trial having been overruled, defendant appealed from the order and judgment.

Mesick & Wood, for Appellant.

I. No evidence whatever was presented by the plaintiffs in support of any of the allegations of their complaint, except that of their ownership and possession. It is conceded by all, that possession was all that was essential to be shown in respect of title; and other proofs, if any were made by plaintiffs upon that point, were superfluous. The defendant introduced no evidence whatever, but submitted the case upon the insufficiency of the proofs made by plaintiffs to maintain the material allegations of their complaint. The vital point then arose to be decided, upon which party rested the burden of proof in respect to the allegations of the complaint, denied by the answer, other than that of possession in plaintiffs. The plaintiffs contended that such other allegations which they, when the complaint was drawn, must have considered essential to their cause of action, could be sustained without proof; and such must have been the view of the court below when making the findings, inasmuch as specific findings of fact were made in accordance with such other allegations of the complaint, and were made admittedly

Blasdel v. Williams.

without one syllable of proof in support of them. The defendant on the other hand contended that those other allegations of the complaint were indispensable to the cause of action, and that findings in support of these allegations were indispensable to recovery, and that such findings ought not to be made and could not be sustained in the absence of all proof whatsoever of the facts found.

II. The facts constituting the cause of action must be pleaded and proven now, as before the existence of the code. Section 256 of the Practice Act merely confers a right of action without undertaking to go farther. If it be possible to make any distinction between cases under this section, and cases not under it where the interference of a court of equity is sought to relieve the owner of real property from an assault upon his title, then this is not a case under the statute. In the case there provided for the right of action is made to depend upon actual possession by the plaintiff, while in this case title is also put forth as the basis of the right as always required to be done in the classes of cases referred to. And the same may be said of all the other averments of the complaint which are denied by the answer. Unquestionably in such case a plaintiff must take the consequences of proving his averments when denied, and cannot shelter himself under the pretense that the statute permitted him to bring his case in a different form from that which he has adopted. The case of *Head v. Fordyce*, 17 Cal. 149, an action brought under a like section of the code of California to determine an adverse claim to a ditch, is exactly in point and decisive of this case. See also *Hibernia Savings and Loan Society v. Ordway*, 38 Cal. 681. From an examination of these cases it will be seen that the point under consideration has been twice definitely and directly decided, as we claim it should be, by the supreme court of California, in *Head v. Fordyce* and *Bostwick v. McCorkle*, and that the

decision in *Hibernia Savings and Loan Society v. Ordway* necessarily leads to the same conclusion; and we may add that there are no decisions to the contrary.

In New York the decisions of the court of appeals are to the same effect, notwithstanding the rule of pleading according to the code may have been somewhat modified by the special provisions of the revised statutes concerning this class of actions. *Voorhees*' N. Y. Code, Sec. 449 and notes, 2 Revised Statutes, N. Y. (Ed. 1852), 573; *Crook v. Andrews*, 40 N. Y. 547; *Scott v. Onderdonk*, 14 N. Y. 9; *Mard v. Dewey*, 16 N. Y. 519; *Farnham v. Campbell*, 34 N. Y. 480; *Allen v. City of Buffalo*, 39 N. Y. 386; *Stansbury v. Arkwright*, 6 Simms, 481.

III. All that has been done by the statute is to enlarge the classes of cases in which relief will be granted (17 Cal. 151,) leaving the matters of pleading, rules of evidence and burden of proof where they always were in that class of cases, when not specially controlled by statute. There being no proof whatever in support of the allegations of the complaint or of the findings of the court in respect to the invalidity of our claim or its apparent validity or its operation or effect as against the title or possession of plaintiff's, the findings and the decree thereon cannot be sustained and the order appealed from should be reversed.

Robert M. Clarke, for Respondents.

I. This is not an action to remove a cloud upon title, but to determine conflicting claims. The actions are dissimilar in every substantial particular. The former is a proceeding in equity by one holding the possession and legal title to annul an instrument valid on its face and raising an adverse title, but which is invalid by reason of facts not apparent on the face of the instrument. 2 Story Eq. Jur. Sec. 700; *Curtis v. Sutter*, 15 Cal. 262; 38 Cal. 680. The latter is an action to

Blasdel v. Williams.

determine who has the better right to the property, and no higher claim than mere possession is required to support it. *Merced Mining Co. v. Fremont*, 7 Cal. 319; *Pralus v. G. & S. M. Co.* 35 Cal. 34. Since the action may be maintained upon naked possession and without title in either party, how can it be true that plaintiffs must show an apparently valid title in the defendant?

II. The statute giving this right of action does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension. *Head v. Fordyce*, 17 Cal. 149; *Seligman v. Kalkman*, 17 Cal. 151. See also *Curtis v. Sutter*, 15 Cal. 263; *Low v. Staples*, 2 Nev. 213.

III. In the action under the statute it is not necessary to set out the character of the defendant's claim. The sufficient and usual averment is that the defendant sets up and claims an estate and interest in and to the said premises adverse to the estate and interest of the plaintiff. *Nash*, Ohio Pl. & Pr. 662; 2 *Estee* Pl. p. 371; 1 *Abbot* Pl. 610; 7 Cal. 317; 30 Cal. 662; 35 Cal. 34; 38 Barb. 92. If unnecessary to plead, it is unnecessary to prove.

IV. In an action to determine conflicting claims to real property, it is sufficient for the plaintiff to prove his possession and title. The burden is then cast upon the defendant to prove his title, and in the absence of proof of a better title in the defendant, the judgment must be for plaintiff. This is the universal rule. *Hall v. Kellogg*, 16 Mich. 135; *Barnard v. Simms*, 42 Barb. 304; *Burnham v. Onderdonk*, 41 N. Y. 426; *Horn v. Jones*, 28 Cal. 202; *Crook v. Forsyth*, 30 Cal. 662; *Sepulveda v. Sepulveda*, 39 Cal. 17. The cases cited by appellant of *Hibernia S. & L. Society v. Ordway*, 38

Bladel v. Williams.

Cal. 680; *Bostwick v. McCorkle*, 22 Cal. 669; *Crook v. Andrews*, 70 Ills. 347; and *Allen v. The City of Buffalo*, 39 N. Y. 387, are not under the statute to determine conflicting claims, but in equity to remove a cloud upon the title and annul the instrument casting the cloud. The cases are wholly unlike, and the authorities therefore not in point.

V. Suppose defendant has no real interest, but claims to have one. Not having an interest, of course it is impossible to prove that any interest exists, much less that it casts a cloud; consequently, according to the theory of appellant, the defendant must prevail. The result would be that the more unfounded the defendant's claim, the more likely he is to succeed.

VI. Any adverse "claim, estate or interest" may be adjudicated, no matter what it is. Practice Act, Sec. 256. The degree or character of the claim is therefore immaterial, and since immaterial, it is not necessary to be shown clearly; it cannot be required that defendant have a valid adverse claim or interest; for if valid, it could not be annulled. *The admission of the defendant that he made some claim, makes a case that may be determined*; and since the asserted claim need not arise to the dignity of a title or even a valid claim, what the claim is must be unimportant and need not appear in the proofs. That this is true is conclusively shown by the next section of the statute, which permits the plaintiff to recover, in case the defendant disclaims any interest or estate by his answer.

By the Court, WHITMAN, C. J.:

This action is under the two hundred and fifty-sixth section of the Practice Act as follows: "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an interest therein adverse to him, for the purpose of deter-

Blasdel v. Williams.

mining such adverse claim, estate or interest." Respondents proved their possession, made some proof of title, and rested; appellant declined to introduce any testimony; whereupon a decree for respondents, finding their title valid and the claim of appellant void. A motion was made for a new trial, upon the ground of insufficiency of evidence, in that "there was no evidence showing or tending to show what was the character or nature of any claim, title, estate or interest of defendant to the premises, either whether it was without right or void, or valid or legal, or an injury to plaintiff's right, or a cloud upon plaintiff's title, or otherwise." The motion was overruled; and from that order and the decree, this appeal was taken.

In ruling upon the motion the district judge took the ground, which is insisted upon by counsel here, that by proof of possession or title; respondents had made a *prima facie* case, and that therefrom the burden of proof attached to appellant, to produce and sustain his claim. Whether the statute be taken by itself and upon its own language, or whether it be considered as an extension of pre-existing remedy to a new class of cases, and an allowance to one in possession of realty to quiet his title thereto, as against one only making adverse claim or without previous trial at law, the conclusion must be the same, that the decision of the district court was error.

The statute gives a right of action to any person in possession of real property; this possession is the base upon which the action is founded. *Lyle v. Robbins*, 25 Cal. 437; *Sepulveda v. Sepulveda*, 39 Cal. 13. To say then that admission or proof of the fact which gives the right of action, establishes *prima facie* the cause of action, is a clear begging of the question. It is true that *Crook v. Forsyth*, 30 Cal. 662, holds that way, and that there are several other California decisions which apparently lean in the same direction; yet a little thought will expose the fallacy of the position.

Imprimis; one having possession of real property may bring an action to determine any claim, estate or interest therein adverse to him. Bringing the suit, he becomes the acting party; and it is necessary for him to show the court that he has a cause of action, and first after pleading his possession as his right to sue, he proceeds to declare an adverse claim. Now, a mere asserted claim is not necessarily an adverse claim; that, must be in some sort prejudicial to the party against whom it is asserted—a claim “whereby the plaintiff might be deprived of the property, or its title (be) clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension.” *Head v. Fordyce*, 17 Cal. 151. Consequently to plead merely an adverse claim, is to plead a conclusion, not to state the facts for the information of the court. Having stated such facts as will tend to sustain his plea of adverse claim, it becomes the pleader to declare in like manner its invalidity; otherwise there is no object in the suit, as a claim by him confessed to be valid is not the subject of litigation. And it cannot be said that the pleader is improperly called upon to plead or prove a negative; for if the assertion of the invalidity of an adverse claim be a negative allegation, it is still one of the grounds of action, and its establishment is an essential element in the case, incumbent on the plaintiff. 1 Green. Ev. Sec. 78. Nor is he excused from such pleading or proof, upon the ground that the subject matter is peculiarly within the knowledge of the other party; for perforce the pleader must be informed as to the particulars of a claim, before he can pronounce it adverse, or be duly advised that he has cause of action. These things, which it is necessary to aver, it is equally necessary to prove; for these constitute the cause of action: without them there is none.

Blasdel v. Williams.

While the pleading suggested is the correct form, doubtless such a complaint as respondent's, which avers an adverse claim, its invalidity and prejudice in general terms, is sufficient in the absence of a demurrer; as it is an attempt to state a cause of action; and is simply a defective statement of such cause, rather than an absolute lack thereof. Still the proof must be made by the actor, and a moment's thought upon the relative rights and position of the parties, will make it evident that the plaintiff is the actor. A defendant in an ordinary suit is not to be brought into court, except upon cause of action against him; that cause under the statute here in question is the assertion of a claim to real property prejudicial to the plaintiff; certainly it devolves upon that plaintiff to show such assertion and its prejudicial effect, which can alone follow from a claim in semblance valid, in reality void. It is probable that the California decisions which look the other way, and which are based upon an identical statute with that of this State, were rendered upon the remembrance of the New York cases, without any critical examination. That might readily be the case as those have been relied on by the district court and respondent's counsel in the case at bar.

The New York statute differs from that of this State in the very material particular, that it places the burden of pleading and proof as to his claim upon the defendant in direct terms; and so advises him in the notice, which opens the proceeding, setting forth sundry matters and, among them, "that the person to whom such notice is directed unjustly claims title to such premises, and that unless such person appear in the supreme court within the time, and assert his claim in the manner provided by law, he and all persons claiming under him will be forever barred," &c. As to the assertion of claim it is provided, "If such person shall not appear and answer within forty days after the service of such notice, setting forth in his answer the title claimed by him

Blasdel v. Williams.

in such premises" then judgment may be taken. R. S. N. Y. 600. The New York Code declares that "proceedings to compel the determination of claims to real property, pursuant to the provisions of the revised statutes, may be prosecuted by action under this act, without regard to the forms of the proceedings as they are prescribed by those statutes. Sec. 449. After considerable wavering, this section is finally held to be merely cumulative and in no wise the statutory remedy. *Burnham v. Onderdonk*, 41 N. Y. 425. However that may be, it is upon the statute as quoted, that the decisions relied on have been made.

There is no analogy between this proceeding and an action under the statute of this State. The action granted by that statute must, no other procedure having been provided, be instituted and conducted as any other action, and the parties thereto must be governed by the same rules as parties to ordinary actions. By these rules the burden of proof must be fixed. That test imposes upon every plaintiff the duty to produce such evidence as will tend to sustain his cause of action, before the defendant is called upon to move. That, as has been heretofore shown, the respondents failed to do. This conclusion agrees with the only California case, in which the point has been fully raised, fairly considered, and made the turning point of a decision. *Head v. Fordyce*, 17 Cal. 149.

The order and judgment appealed [from are reversed and the cause remanded.

By HAWLEY, J., dissenting:

Under the pleadings and proofs in this case as presented by the record, I think that the burden of proof was upon the defendant to prove his adverse claim. The answer admits that the defendant claims an estate and interest in the property adverse to the plaintiffs. The defendant's denial

Blasdel v. Williams.

of the averments in plaintiffs' complaint that "he has no legal interest or estate in said property or any part thereof, or valid claim or title thereto, or that his claim is without right or void," is equivalent to an affirmative allegation that he has a valid claim.

The statute, under which this suit was brought, was intended not only to extend the remedy, so as to allow a party having the possessory title to real property to bring an action to remove any cloud upon his title, but also to provide a new remedy for cases where a party out of possession claims an estate or interest in the property, adverse to the party in possession and injurious to his rights. It confers a jurisdiction beyond that ordinarily exercised by courts of equity to afford relief in the quieting of title and possession of real property. Under the statute it is not necessary to delay suit until plaintiffs' possession has been disturbed as in the action of ejectment. I think that the intention of the legislature in adopting this statute was to require the defendant, in actions like the one under consideration, to produce and prove his title in order that the claims of the respective parties to the property might be forever quieted and determined. This view of the case is fully supported by all the decisions in California bearing upon this question, rendered upon a statute identical with the statute of this State. *Merced Mining Co. v. Fremont*, 7 Cal. 319; *Curtis v. Sutter*, 15 Cal. 262; *Crook v. Forsyth*, 30 Cal. 662; *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 34; *Sepulveda v. Sepulveda*, 39 Cal. 17.

Burnett, J., in *Merced Mining Co. v. Fremont*, said: "If the holder of the adverse claim, out of possession, should delay bringing his suit, the party in possession can force him to produce his claim and submit it to the determination of the proper tribunal." Chief Justice Field, in delivering the opinion of the court in *Curtis v. Sutter*, said: "It is

Blasdel v. Williams.

sufficient if, whilst in the possession of the property, a party out of possession claims an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted." The same views were expressed by the supreme court of the United States, in *Stark v. Starrs*, 6 Wallace, 410, relative to the statute of Oregon similar in its provisions to the statute of California. In *Crook v. Forsyth*, the complaint averred ownership and possession of the property in plaintiff and alleged that the defendant claimed an estate, title or interest in it adverse to plaintiff, but that the claim was void and the defendant had no estate, or title or interest in the land." The answer admitted plaintiff's possession and set up title in defendant. It was held by the court, Shafter, J., delivering the opinion, that "The burden of proof under the issues joined was upon the defendant." That case was, in effect, identical with the case at bar; for when the jury found that plaintiff was in the possession of the property, the question was presented to the court in the same light as if the defendant had admitted it in the pleadings. The case of *Head v. Fordyce*, 17 Cal. 151, is not in opposition to *Crook v. Forsyth*. The principles announced in *Head v. Fordyce*, when considered in the light of the facts therein presented, support the views I have expressed as to the object of the statute. That action was brought by the plaintiff to prevent the defendant from enforcing a decree of foreclosure, under a mechanic's lien, which it was averred was obtained by fraud and collusion and was a cloud upon the plaintiffs' title. Under this state of facts it was properly held, that "the plaintiff, in seeking to set aside the decree as a cloud upon his title to the property, must show affirmatively that Fordyce had no claim on the property, or any right to subject it or any part of it."

Blasdel v. Williams.

The right of action in all cases provided for in the statute may be founded upon the mere possession of the plaintiff. But the cause of action is often different. When the action is brought to remove a cloud upon the title, the cause of action consists in the invalidity of defendant's claim which is not apparent upon its face. In such actions it is undoubtedly true, that the facts, which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity ought to be stated in the complaint and proved by the plaintiff on the trial. But in other cases like *Crook v. Forsyth* and the one under consideration, the cause of action is the claim made by defendant of an adverse estate or interest in the property.

I consider the cases cited from New York, applicable to the case at bar. The prayer of plaintiffs' complaint, "that the defendant be required to exhibit and show the nature of his claim," is warranted by the statute and is, in effect, substantially the same as the statement in the notice required by the revised statute of New York. The case of *Barnard v. Simms*, 42 Barb. 308, was brought under that statute and it was therein, as here, contended that when a party was brought into court and made a defendant the plaintiff is bound to show that the defendant claims, or pretends to claim, such an interest as would constitute a cause of action under the statute. The court held that this was a misapprehension of the objects of the statute and said, "if the defendant has a title he is bound to produce and prove it." It was further held that the plaintiff was not required to show anything beyond his three years possession as provided for in the statute.

In my opinion, the judgment and decree of the district court was correct and ought to be affirmed.

State v. Johnson.

THE STATE OF NEVADA, RESPONDENT, v. CHARLES F. JOHNSON, APPELLANT.

INDICTMENT—MISSTATEMENT OF LEGAL APPELLATION OF CRIME. Where, after the amendment of the crimes act, substituting "assault with intent to kill" (Stats. 1873, 119) for "assault with intent to commit murder" (Stats. 1861, 64), an indictment designated the offense charged as an "assault with intent to commit murder," and specially charged an assault "with intent to kill and murder," and the accused was convicted of "assault with a deadly weapon with intent to inflict a bodily injury": *Held*, that the failure to state the legal appellation of the crime in the charging portion of the indictment was a defect of form and, no objection having been taken by demurrer, could not have prejudiced the defendant.

ASSAULT WITH INTENT TO "KILL AND MURDER"—SURPLUSAGE. Where an indictment in setting out an assault with intent to kill charged an "intent to kill and murder": *Held*, that as there was no statutory offense of an attempt "to kill and murder" or "to murder," the words "and murder" were unmeaning and should be rejected.

OBJECTION TO INDICTMENT FOR CHARGING TWO OFFENSES—DEMURRER. An objection to an indictment, that it charges more than one offense, should be taken by special demurrer.

APPEAL from the District Court of the First Judicial District, Storey County.

The defendant, having been convicted of the crime of assault with intent to commit bodily injury, was sentenced to confinement at hard labor in the State prison for the term of two years. He appealed from the judgment.

R. H. Taylor, for Appellant.

I. An indictment under a statute must follow the statute strictly, and recite it substantially. Neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion will make good an indictment which does not bring the fact prohibited, in the doing of which the offense consists, within all the material words of the statute. 1 Hale's

State v. Johnson.

P. C. 517; 2 Hale's P. C. 170; 2 Hawk. P. C., Ch. 25, Sec. 110; 1 Wharton's Am. Crim. Law. Sec. 364, and cases there cited.

II. There is a substantial difference between "intent to commit murder" and "intent to kill." The latter may exist where the party intends only such killing as amounts to manslaughter. 1 Bishop Crim. Law, sec. 667, note 1; *State v. Nichols*, 8 Conn. 496; *Nancy v. State*, 6 Ala. 483; *State v. Burns*, 8 Ala. 313; *Beasley v. State*, 18 Ala. 540; *Scitz v. State*, 23 Ala. 42; *Ogletree v. State*, 28 Ala. 693; *Commonw. v. McLaughlin*, 13 Cush. 615; *Rex v. Curran*, 3 Carr. & P. 397; *Rex v. Coe*, 6 Carr. & P. 403; *Rex v. Howlett*, 7 Carr. & P. 274.

III. There has been in this State, since March 4, 1873, when section 47 of the act of 1861 was repealed, no such public offense as "an assault with an intent to commit murder." But it is clear that an indictment which charges "an assault with intent to kill *and* murder," is an indictment charging "an assault with an intent to commit *murder*." Murder includes killing; but killing is not necessarily murder. "Murder" is therefore the stronger expression; consequently it cannot be rejected as surplusage. Surplusage in pleading is *redundancy*—it is matter which adds nothing to the force of the pleading. If there be surplusage in the phrase "with intent to kill and murder," it is to be found in the word "kill." Under the law of 1861 this indictment would undoubtedly have been good. It would not have been good under that law if the words "and murder" are surplusage. But they are not surplusage, being of the essence of the offense charged.

L. A. Buckner, Attorney General, for Respondent.

I. The words used in the indictment are those of the statute: "An assault with intent to kill;" but the words

State v. Johnson.

"and murder" were uselessly added, but did not vitiate the pleading, or make it charge two separate public offenses. It is a rule of extensive application with reference to written instruments, and in the science of pleading, that matter which is mere surplusage may be rejected, and does not vitiate the instrument or pleading in which it is found. The offense charged is not murder, because no death is stated; on the contrary a mere attempt to commit a public offense is stated. It is not an assault to commit murder, because there is no such statutory offense as an assault to commit murder. It is therefore certain the district attorney did not intend, by the use of the conjunction, "and," to couple such offense with the public offense of "an assault with intent to kill," which was the offense he clearly intended to charge in the indictment, and did charge. If there had been any such offense as "an assault to commit murder," then it is probable the word "and" might have been regarded as connecting two phrases; for the words quoted last would have been a technical phrase, and construed as such, but not being technical they are to be construed in their usual acceptance.

II. If the indictment states facts sufficient to constitute a public offense, although it may charge more than one offense, it can only be taken advantage of on special demurrer.

III. The preamble of the indictment is mere matter of form. In *The State v. Anderson*, 3 Nev. 256, it is said "that part of the indictment charging the defendant with the commission of a crime by name * * * is simply formal, and could be omitted entirely," &c. It has been so held frequently in California. *People v. War*, 20 Cal. 117; *People v. Beatty*, 14 Cal. 566.

State v. Johnson.

By the Court, BELKNAP, J.:

The legislature of 1873 amended section forty seven of the crimes act of 1861 by substituting for the offense, "assault with intent to commit murder," that of "assault with intent to kill." Stats. 1861, 64; Stats. 1873, 119. Subsequently the defendant was charged by indictment with "an assault with intent to commit murder." The specific accusation reads: "that on the twenty-first day of April, A. D. 1873, or thereabouts, at the County of Storey, State of Nevada, without authority of law, and with malice aforethought, with a deadly weapon, to wit: a knife, the said Charles F. Johnson, then and there being armed, did, without authority of law and with malice aforethought, make an assault in and upon one Wm. H. Virden, with intent to kill and murder the said Wm. H. Virden, all of which is contrary," &c. No objection was interposed to the indictment until a motion was made to arrest judgment upon a verdict of guilty of an assault with a deadly weapon with intent to inflict a bodily injury, no considerable provocation appearing. The motion was rested upon the ground that the facts stated in the indictment do not constitute a public offense. The district court denied the motion. Defendant appeals from the judgment.

The failure to state the legal application of the crime in the charging portion of the indictment is a defect of form, and could not have prejudiced the defendant. *State v. Anderson*, 3 Nev. 256; *People v. Phipps*, 39 Cal. 326. The district court had jurisdiction over the subject of the indictment, and the judgment cannot be arrested if the facts stated constitute a public offense. Stats. 1861, 466.

The objection urged upon this point is in stating the assault to have been committed "with intent to kill and murder." There is no statutory offense in this State designated "assault with intent to kill and murder," nor "assault with

State v. Cohn.

intent to commit murder." The words "and murder," are unmeaning in the indictment; rejecting them, an assault with intent to kill is sufficiently described. If, however, "an intent to kill," and "and intent to commit murder" were distinct offenses, and the indictment charged more than one offense, objection should have been taken by special demurrer. Stats. 1861, 465, Secs. 286, 294.

Judgment affirmed.

THE STATE OF NEVADA, RESPONDENT, v. ALEX-
ANDER COHN, APPELLANT.

ARSON—EVIDENCE OF OVER-INSURANCE TO SHOW MOTIVE. In a criminal prosecution for arson in the second degree under section 57 of the Crimes Act, where the testimony was all circumstantial: *Held*, that evidence of an over-large insurance upon the goods of the accused destroyed by the fire was entirely competent as tending to show a possible or probable motive—such motive being a material link in the chain of circumstances.

MOTIVE AS A CIRCUMSTANCE OF EVIDENCE. Motive does not of itself prove guilt; nor on the other hand is the prosecution bound to conclusive proof of guilt before motive can be considered; but motive is a unit contributing to make up the sum total of proof.

ARSON—WHEN INSURANCE MAY BE PROVED BY PAROL. When, in a prosecution for arson, the fact of a belief on the part of the accused that he was over-insured became material, as tending to show a motive and thus making an important link in the chain of circumstances: *Held*, that the place and amount of such insurance might be proved by parol, without producing the policy of insurance.

EXTENT OF CROSS-EXAMINATION OF ACCUSED. Where a defendant in a criminal case offers himself as a witness on his own behalf, he is to be held and treated so far as an ordinary witness for the defense that he can be cross-examined, and in the discretion of the court recalled for further cross-examination.

State v. Cohn.

PROSECUTION CANNOT MAKE ACCUSED ITS OWN WITNESS. Though an accused person may become a witness in his own behalf and thereby subject himself to cross-examination, the prosecution cannot make him, against his consent, its own witness.

ACT ESTABLISHING BOUNDS AND EXEMPTING JURORS NOT UNCONSTITUTIONAL. Where in a criminal case it was objected that the accused was unconstitutionally deprived of a common law jury by operation of the act allowing bounds to be fixed by judges and exempting persons residing outside thereof from jury duty on the payment of \$25, (Stats. 1873, 128): *Held*, that, however pernicious the system adopted might be, it was still but an exercise of a legitimate legislative power of exemption and therefore not unconstitutional.

EXCUSING GRAND JUROR BY MISTAKE AND RECALLING HIM. Where a grand juror was inadvertently told by the judge that he was excused, but before any order excusing him was entered, the mistake was corrected and he was recalled and participated in the proceedings: *Held*, that the court had the undoubted right to correct the mistake.

RIGHT TO TRAVERSE CHALLENGE TO GRAND JUROR AFTER WAIVER OF TRAVERSE. Where a grand juror was challenged by an accused person and the district attorney waived the right to traverse it; and the court ordered the juror not to be present at any consideration of the charges against accused; but, it afterwards appearing that he had inadvertently been present for a few minutes, the district attorney was allowed to call the grand jury into court and then traverse the challenge and show it to be groundless: *Held*, that it was within the discretion of the court to allow the district attorney to traverse the challenge after he had originally waived it.

WHO IS "PROSECUTOR" IN A CRIMINAL TRIAL. A prosecutor is one who instigates the prosecution by making the affidavit upon which the accused is arrested; so that the person named in the indictment as the owner of the property, in respect to which the alleged crime is charged to have been committed, is not necessarily the prosecutor.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

The defendant was charged by the indictment with the "crime of arson in the second degree, committed as follows, to wit: That the said Alexander Cohn, at the County of White Pine, State aforesaid, in the day time on the twenty-seventh day of June, A. D. 1873, that certain building, to

State v. Cohn.

wit: a building situate on the east side of Main street in the town of Hamilton, county and State aforesaid, known and called the "Jackson House," then and there the property of one Andrew Jackson of said County of White Pine, State aforesaid, feloniously, wilfully and maliciously did set fire to and the said before described building by such firing as aforesaid, feloniously, wilfully and maliciously did burn," etc.

The indictment was presented on October 8, 1873. On the day previous, when the grand jury was empaneled, the defendant by his counsel challenged Andrew Jackson and W. J. Smith on the ground that they were prosecutors against defendant; and, upon the district attorney stating that he had no objection to said jurors being instructed not to take part in the investigation of the charges against the accused, the challenge was allowed and the jurors directed not to participate in such investigation. But it afterwards appearing that said Smith by inadvertence had been present in the grand jury room during the examination of a witness against defendant, the grand jury was again brought into court and the district attorney traversed the challenge to Smith and Jackson; whereupon, the defendant and his counsel being present and declining to allege any fact going to show that said jurors were prosecutors against defendant, and it appearing to the court that they were not prosecutors, the challenge was overruled.

It appeared on the trial that the fire, which defendant was charged with having caused, consumed several houses, one of them the house in which defendant had a stock of goods consisting chiefly of cigars and tobacco, and another the "Jackson House" referred to in the indictment. The stock of goods was insured, and to prove this fact the prosecution called Morris Cohn, defendant's brother and partner, who testified that the policies were in San Francisco in the hands of creditors, to whom they had been assigned. De-

State v. Cohn.

defendant objected to any proof by the witness of the contents of the policies on the ground that the policies themselves were the best evidence. The objection was overruled and defendant excepted. The witness then stated that there were three policies for \$3000 in each of the "Commercial Union," "Fireman's Fund" and "State Investment" insurance companies.

On defense the accused offered himself as a witness in his own behalf and testified at length. He was then cross-examined by the prosecution; and no objection was made at the time to his cross-examination. He was then reexamined in chief. After the defense rested, the district attorney asked permission to recall the defendant for further cross-examination in order to lay a foundation to impeach his testimony. Defendant objected on the ground that the State should have exhausted its cross-examination before the defendant rested, and on the further ground that the recall under the circumstances would be making the accused a witness against himself without his consent. The objections were overruled and the defendant excepted.

It further appeared in the case that in accordance with the provisions of the statute of March 5, 1873 (Stats. 1873, 138) the district judge on March 24, 1873, made an order that "all persons residing more than fifteen miles from the court house of White Pine County may be exempted from serving on grand or trial juries, upon complying with the conditions prescribed by said act," and that by operation of said act and order a number of persons, otherwise liable to jury duty, were exempted therefrom.

The result of the trial was the conviction of the defendant; and a motion for new trial having been overruled, he was sentenced to confinement in the State prison for the term of seven years. He appealed from the order overruling his motion and from the judgment.

State v. Cohn.

Thomas H. Wells, for Appellant.

I. The facts alleged in the indictment do not constitute the crime sought to be established by the proofs—that is to say, arson in the second degree, as defined by section 58 of the crimes and punishment act. And if it be said that the indictment was good under section 57 of the same act, then the verdict should have been set aside and a new trial granted, because the *probata* did not support the *allegata*, and also because the court erred in its instructions in proceeding upon the theory that the indictment was under section 58. The indictment did not mention any insurance or any intent to injure or defraud any insurer; yet the indispensable basis of all essential proof in the case, to show that defendant burned the “Jackson House,” was to show that he burned his own, it being at the time insured, and that he did it to defraud his insurers. But as the indictment did not make any allegation as to insurance, we insist that no proof should have been admitted as to defendant’s insurance, or the character, extent or value of his stock on hand; nor should the court have charged, as it did, in reference thereto.

II. Proof of motive alone is not sufficient to convict a man of any crime; but if it be desired to adduce proof of motive specially—proof other than that which, establishing the *corpus delicti* and connecting the defendant with the perpetration of the offense, tends also to disclose motive on his part for doing the alleged wrongful act—some foundation for its introduction must be laid in the allegations of the indictment. See 10 Peters, 209; 2 Bishop’s Crim. Law, Sec. 12; 2 Sumner, 209; 2 Bishop’s Crim. Pro. Sec. 35, 45; 1 Sumner, 375; 28 Cal. 65; 29 Cal. Rep. 259; Burrill’s Cir. Ev. 312 *et seq.*; 3 Chit. Cr. Law, 1126, 1036, and cases there cited; 32 Cal. 161.

III. There was error in permitting the State to prove by oral testimony the facts which should have been proved by

State v. Cohn.

the policies of insurance. No foundation had been laid for the admission of oral evidence; the policies themselves, as the best evidence, should have been produced. They might, upon production, have been found to be invalid or improperly executed.

IV. An accused person cannot be compelled to testify against himself, and therefore cannot be legally put under cross-examination at any time or at any stage of the trial. It is his constitutional right that he shall not be compelled to give evidence against himself. The statutory provision that a defendant *may* testify in a criminal trial on his own behalf, does not in the least impair or relax the rule of fundamental law, that he shall not be required to testify *against* himself. The object of a cross-examination of a defendant is to weaken what he has testified to against the State and to get out of him something favorable to the State, and consequently against himself.

V. The State had no right to recall defendant, after the defense had rested, and again put him under cross-examination. The evidence thus elicited, if legitimate cross-examination, ought to have been elicited before defendant rested. But it was just as much a violation of his constitutional right to be thus called and examined, with a view of laying the foundation, from his own testimony, of impeaching him, as it would have been to ask him to testify in a direct form against himself. When an accused person will or will not testify, and what he will testify and what he will not testify, are all matters left to his election; and when at any stage of examination, evidence is elicited from him under his objection, he is *compelled to testify*.

W. F. Anderson, also for the Appellant.

I. Defendant did not have a fair and impartial jury obtained by means known to the common law; but under the

State v. Cohn.

operation of the statute of March 5, 1873, in relation to the fixing of limits by judges, and the exemption of jurors living outside of such bounds, the jury was in effect selected by the judge himself.

If this act be valid the judge is invested with the power to change his lines and make them as eccentric as may be his humor, and the sacred right of jury trial will be imperilled. As well might the statute at once provide that all persons who are able to pay \$25 per annum shall be excused, and their duties devolve upon those idle or worthless persons to whom \$3 per day is an object; and particularly so with the chances of larger compensation under certain circumstances.

II. On the empanelment of the grand jury the accused interposed challenges to the grand jurors Jackson and Smith on account of their being active prosecutors of the case. These challenges were confessed by the district attorney, and Jackson and Smith were directed, according to the statute, not to take part in the investigation of the charges against Cohn. It appears, however, that, notwithstanding the order, Jackson and Smith were present in the grand jury room while the charges against the accused were being considered. It is true the grand jury was ordered into court and, upon the disclosure of these facts, the district attorney was allowed to traverse the challenges which he had previously confessed; and the court directed Jackson and Smith to remain in the grand jury room and participate in the investigation of the charges against defendant; but in this proceeding, both the district attorney and the court appear to us to have stultified themselves.

L. A. Buckner, Attorney General, for Respondent.

State v. Cohn.

By the Court, WHITMAN, C. J.:

The indictment in this case was for arson in the second degree, under the following section of the crimes and punishment act, "Sec. 57. Every person who shall wilfully and maliciously burn, or cause to be burned, any dwelling house or building owned by himself, or the property of another, in the day time * * * * shall be deemed guilty of arson in the second degree."

Appellant claims, that although indicted under section 57, he was tried under section 58, as follows, "Sec. 58. Every person who shall wilfully burn, or cause to be burned, any building, or any goods, wares, merchandise, or other chattel, which shall be at the time insured against loss or damage by fire, with intent to injure or defraud such insurer, whether the same be the property of such person, or any other, shall upon conviction be adjudged guilty of arson in the second degree, and punished accordingly."

It is attempted to sustain this proposition by showing that the prosecution was allowed to prove that there was an over-large insurance upon the goods of appellant destroyed by fire; but it does not follow that the evidence was introduced to prove any crime under the section last quoted: it was entirely competent, and under the indictment tended merely, to show a possible or probable motive on appellant's part, to do an act otherwise inexplicable. The evidence in the case, which was purely circumstantial, tended to prove that a fire more fierce and sudden than natural cause would ordinarily produce, attended by a volume of very black smoke and a pronounced smell of coal oil, broke out at a very early hour in the morning in a room of appellant's store, where he alone was sleeping; and that the fire destroyed his premises and goods and the house of the party mentioned in the indictment. There was proof tending to show acts and language of appellant before and after the fire under the circumstances

suspicious ; and then came the evidence objected to, which constituted a material and proper link in the chain. There was the fire at a certain place, under certain surroundings, with appellant present at its inception. Now, it is not a natural thing for a man to fire his own premises : presumptively appellant was innocent. What then is the logical and natural course of human thought at such juncture ? Is it not to inquire what motive, if any, existed which could have influenced a sane person to do such an act ? Such was the course pursued by the prosecution ; the motive was sought ; and by it claimed to be found in the fact of an undue insurance ; not only a perfectly proper proceeding, but indeed the only one open.

In this view the following instructions offered by appellant, the refusing of which is assigned as error, are seen to be improper ; as they would prevent the jury from considering motive as a link in the chain of testimony. These are the instructions :—

“1st. That the evidence of crime arising from imputation of motive alone is inconclusive, and ought not to be considered by the jury as sufficient to authorize them in convicting the defendant, unless they, the jury, are satisfied by other evidence that the fire was intentionally created by some one with the purpose of causing the burning of some part of Hamilton and that the fire was set by Alexander Cohn, and no other person.”

“2d. That when a fire occurs which destroys property, it cannot be inferred by the jury that the same originated in the criminal design of the party who may have had an interested motive in producing such fire ; but the criminal or malicious agency, as contradistinguished from accident, must be proved beyond a reasonable doubt, by facts independent of the motive of a particular person.”

Of course, motive does not of itself prove guilt ; nor on the other hand, is the prosecution bound to conclusive proof

State v. Cohn.

of the guilty act in a particular person, or in any person, before motive can be considered. In the manner and form in which the evidence of motive was under the testimony and charge of the court presented to the jury, it was proper for them to weigh it as a unit, contributing to make up the sum total of proof; and they need not, as appellant claims, have been legally satisfied of his guilt *aliunde*, before they could consider his motive.

Morris Cohn, partner and brother of appellant, was allowed to testify to the amount and place of insurance upon their property, without production of the policies; this is said not to be the best evidence. Certainly not the best evidence of insurance; but that was not the ultimate fact sought. True, as suggested in argument, the policies might have been invalid and in fact no insurance, but that is immaterial; the fact to be proven was the belief of appellant that he was insured; and though that belief might have been entirely misplaced, still as the basis for a motive to fire his property, it continued real and true to him.

The appellant offered himself as a witness in his own behalf under the statute of this State, which provides that—"In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury under the instructions of the court. Nothing herein contained shall be construed as compelling any such person to testify; and in all cases wherein the defendant to a criminal action declines to testify, the court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause." Comp. Laws, Secs. 2305-6. He was examined and cross-examined, and after his case had been rested the prosecution was allowed to recall and question him against his objection both to the recall and the

State v. Cohn.

cross-examination. This is urged as unconstitutional procedure, in that it was compelling him to be a witness against himself. The objection goes generally to the entire cross-examination, and specially to the recall. As to the latter point, if he was a witness in the ordinary sense his recall was entirely within the discretion of the court; not that by or under such a recall, the prosecution did or could make the appellant its own witness, for this would indeed be to compel him to be a witness against himself; but on such recall, not in itself improper, any question might properly be put, which was legitimate cross-examination; and in such cases if defendants occupy place as ordinary witnesses, courts would allow much latitude therein. That one offering himself as appellant did, as a witness in his own behalf, is to be held and treated as an ordinary witness, has been frequently decided under similar statutes; and although a very highly esteemed judge and text writer (Cooley) leans the other way, the weight of reason and authority is in favor of the affirmative position. *Connors v. The People*, 50 N. Y. 240; *Brandon v. The People*, 42 N. Y. 265; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Bonner*, 97 Mass. 587; *Com. v. Morgan*, 107 Mass. 199; *People v. Reinhart*, 39 Cal. 449. To the same effect is the recent case of *State v. Ober*, N. H. Aug. 14, 1873, as yet unreported, but to be found in the Chicago Legal News, of the twenty-third of the same month.

The jury in this case was selected under certain special provisions of the statute regulating such matters, which appellant claims to be unconstitutional, as depriving him of a trial by a common law jury. This is the objectionable law: "The judges of the several district courts may, by an order entered upon the minutes of their courts, prescribe bounds in their several counties, and all persons residing without such bounds may be exempted from serving on juries in the manner hereinafter prescribed." Stats. 1873, 128. That manner is by making proof of residence and

State v. Cohn.

payment of twenty-five dollars. Did the establishment of bounds, as seems to be claimed by appellant, finally shut out a portion of the county and definitely fix the non-liability of citizens therefrom to jury duty, there might possibly be more weight to his argument; but it is useless to consider a non-existent condition. The result of establishing bounds is only to exempt jurors beyond them, upon payment by such exemptee of twenty-five dollars. To what extent the system or rather non-system of exemption may be carried is difficult to say; it is coeval with jury trial at common law, and has of necessity many times, and of whim or caprice many other times, been materially altered. 5 Bac. Ab. 356-8. That the exemption in question is pernicious may be admitted. It tends to impose undue jury duty upon poor men in one direction; and in another, to foster and encourage that most baneful parasite upon the body politic—the professional jurymen. These might have been arguments against its passage; may be for its repeal, but do not tend to impeach its constitutionality. “To preserve the trial by jury inviolate cannot mean that we must pursue the exact course taken in England to collect jurors. If it does, what time is to be selected; for they have been constantly altering the qualifications, the exemptions and the mode of summoning jurors?” *Colt v. Eves*, 12 Conn. 243; *Beers v. Beers*, 4 Conn. 535.

The point made against the legality of the grand jury is fully and fairly answered by the district court thus: “The grounds, upon which the motion to quash the indictment was based, were the mistake in excusing Smith from the panel of the grand jury and afterwards recalling him—and the participation of Smith and Jackson in the finding of the indictment against the defendant. * * * The mistake in excusing Smith was an inadvertence which was corrected before any order excusing him was actually made. He was told he would be excused; before the order was entered he

State v. Cohn.

was told he would not be excused. The court undoubtedly had the right to correct the mistake then and there, and the defendant (appellant) was in no wise prejudiced. * * The challenge to Smith and Jackson was not traversed by the district attorney at the time it was made, simply because (it is to be presumed) he intended to use them as witnesses and was willing to waive the privilege of having them serve as jurors. When afterwards, owing to his misunderstanding of the order of the court, one of the challenged jurors had been improperly present for a few moments in the jury-room during the examination of a witness against Cohn, the district attorney was permitted to traverse the challenge in order, if there were no grounds for it, to obviate the necessity of drawing a grand jury. There were no grounds for the challenge. The defendant (appellant) had the opportunity of specifying them, if any existed, and failed to do so. He had lost no right nor opportunity by reason of the original failure of the district attorney to traverse the challenge; and it was entirely within the discretion of the court, to allow the district attorney to oppose the challenge after he had originally waived the right to do so, unless the defendant (appellant) would have been thereby prejudiced. * * The fact that this defendant (appellant) was indicted for burning Jackson's house does not constitute Jackson a prosecutor against him. A prosecutor is one who instigates the prosecution by making the affidavit upon which a defendant is arrested. Jackson had made no such affidavit; and besides at the time of the challenge no charge had been made against the defendant (appellant) for burning Jackson's house." Opinion of District Court, transcript, pp. 115 and 116.

There was evidence tending to sustain the charge of the indictment: that it was entirely circumstantial does not impair its weight if it was sufficient to satisfy the jury beyond any reasonable doubt of appellant's guilt. That it was, appears from the verdict. With the jury abides the right of

Dalton v. Libby and Lamburth.

decision upon the facts; and there rests the responsibility, to be disturbed by the district court only when convinced of error on their part. In this case the district court was not so convinced, and refused to grant a new trial. Such act was justified by the law and the evidence.

The order and judgment are affirmed.

PETER DALTON, APPELLANT, v. WILLIAM LIBBY
AND THOMAS LAMBURTH, RESPONDENTS.

REMEDY IN EQUITY TO SET ASIDE VOID JUDGMENT. Where a party, against whom a void judgment has been rendered, exhausts his remedy by motion to have it set aside, he may maintain a suit in equity for that purpose.

JUDGMENT RENDERED OUT OF TERM VOID. A judgment rendered at a time and place other than those appointed by law, is no judgment; it is not merely erroneous; it is void.

JUDGMENTS NOT SET ASIDE IN EQUITY FOR MATTERS AVAILABLE AS DEFENSE. In a suit to set aside a judgment on an injunction bond, on the ground that the judgment in the injunction suit was rendered out of term and therefore void: *Held*, that the facts touching the invalidity of the judgment in the injunction suit should have been set up in defense to the action on the bond; and in the absence of such defense the judgment on the bond should stand.

Appeal from the District Court of the Second Judicial District, Washoe County.

This was an action in equity brought for the purpose of setting aside a judgment, rendered in the same court in favor of defendants in the case of Dalton v. Libby and Lamburth; also to set aside two judgments in the same court, one in favor of Libby against Dalton, and one in favor of Lamburth against Dalton; and for an injunction to enjoin the enforcement of the judgments against Dalton. After

Dalton v. Libby and Lamburth.

the commencement of the suit of Dalton v. Libby and Lamburth, an act of the legislature removing the county seat of Washoe County from Washoe to Reno, took effect; but before the term commenced, the district court pronounced the act unconstitutional, and enjoined the officers from removing the archives. In this state of the decision the term came on and court was opened at Washoe. Afterwards the Supreme Court reversed the decision of the district court, and held the act constitutional; whereupon the court adjourned to Reno, and held out at that place the term which had been commenced at Washoe; and among other things tried at Reno, at such so-called adjourned term, the case of Dalton v. Libby and Lamburth, which resulted in favor of defendants. There had been an injunction in that case, and subsequently Libby and Lamburth brought separate actions against Dalton and his sureties on the injunction bond. These suits resulted in favor of Libby and Lamburth respectively, and on appeal the judgments were affirmed. See *Libby v. Dalton*, ante 23, and *Lamburth v. Dalton*, ante 64.

Haydon & Cain, for Appellant.

I. The trial in Dalton v. Libby and Lamburth was had and the judgment rendered out of term, and the judgment was therefore void. *State v. J. Bedford Roberts*, 8 Nev. 241; Freeman on Judgments, Secs. 98, 117, 121. Such judgment should be set aside on motion; but plaintiff exhausted his remedy by motion, which was denied; and his remedy now is by suit in equity. *Henly v. Hastings*, 3 Cal. 341; *Allender v. Fritz*, 24 Cal. 447; Freeman on Judgments, Sec. 511; *Bibend v. Kreutz*, 20 Cal. 114, 115; *Wilson v. Montgomery*, 14 S. & M. 205; *Connery v. Swift*, ante 39.

II. If the judgment in the injunction suit was void, it follows as a corollary that the two judgments on the injunction bond are equally nullities. All cause of action on the

Dalton v. Libby and Lamburth.

bond depends upon the fact whether the court did or did not finally decide that plaintiff was not entitled to such injunction. If the judgment on that question was void, as we have shown, there was of course no cause of action on the bond and the court had no jurisdiction of the subject matter; and, though there was no objection either by demurrer or answer, and though the objection did not appear on the face of the complaint explicitly or at all, it was still not waived. *Lake Bigler Road Co. v. Bedford*, 3 Nev. 403.

Robert M. Clarke, for Respondents.

I. The district court having pronounced the statute removing the county seat of Washoe County from Washoe to Reno unconstitutional and void, such decision became, and was the law until reversed. Washoe was the county seat in the interim between such decision and the judgment of reversal by the Supreme Court; and it was therefore the proper place to open and hold the court. The term therefore did not lapse.

II. Admitting that the term lapsed by reason of the failure to open it at Reno on the first day of the term, nevertheless the judgment is conclusive and cannot be attacked in the manner attempted. The objection should have been taken at the trial below, and reviewed by appeal as in the case of the *State v. Roberts*, 8 Nev. 239; *Freeman on Judgments*, 86, 87; 1 *Indiana*, 133; 2 *Florida*, 267; 18 *Pickering*, 393; 41 *Cal.* 255; 44 *Cal.* 85.

III. In the cases on the bond, the court had jurisdiction of the subject matter and parties. No fraud was pretended; and nothing now appears except the neglect of Dalton to interpose the defense that the judgment in the injunction suit was void, which might have been interposed and which was directly involved. The court cannot con-

Dalton v. Libby and Lamburth.

sistently with established law relieve Dalton from the consequences of this neglect. The case cannot be re-opened and relitigated in this way.

Haydon & Cain, for Appellant, in reply.

It is conceded that we cannot interpose any "defense" at this time to the judgments of *Libby v. Dalton* and *Lamburth v. Dalton*. We do not allege any defense in the complaint, nor rely upon any; all we seek to do is to show an *original inherent fatal defect* in these judgments, that makes them void *ab initio*, by reason of there being no cause of action whatever to support them.

By the Court, WHITMAN, C. J.:

Appellant, by his bill, seeks to avoid three several judgments: first, the decree and judgment rendered on the fifteenth of July, 1871, in favor of respondents against him. His motion to that effect was denied in the district court; and he is entitled to maintain this bill, having exhausted his legal remedy, upon the ground that such judgment and decree were void. *State v. Roberts*, 8 Nev. 239. The facts upon which this court stands for this holding, appear fully in the case cited; therefore it is unnecessary to repeat them here.

The other two judgments are identical, and may be considered as one, for the purposes of this decision; they were obtained on an injunction bond, executed in the original cause before mentioned. The cases were tried at a regular term of the district court, appellant made defense there, and here; where on appeal from the judgments they were affirmed. Respondents insist that appellant should not have the relief asked by him against them; and that the order

Dalton v. Libby and Lamburth.

denying his application for an injunction should be sustained. This upon two grounds; first, that the original judgment was erroneous rather than voidable or void. This is not tenable; it purported on its face to be rendered by a court at a regular term; when in fact it was rendered by no court, at no term, and was in fact and law no more the judgment of the court than if an arrant forgery. Secondly, it is claimed that appellant should have set up the facts touching this judgment in defense of the suits in which the judgments here complained of were rendered. This position is correct; for while the original judgment must upon showing of the whole record of the court be pronounced void, yet it does not so appear of its own record; that, being regular on its face, required extraneous facts to be shown to impeach it. To illustrate: had the original judgment become the foundation of a suit against appellant in another state, it must be allowed that it would have sustained a judgment; no proof being made of its invalidity. So here; to these suits based upon the injunction bond, which gave no cause of action until final judgment in the case had vitalized it; it was a complete defense to show no such judgment; but in the absence of such showing, which could have been made and was not, these judgments should stand, because apparently there was such final judgment.

Appellant claims that he was not called upon to defend against a nullity; that there could be no action upon the injunction bond until there was final judgment in the case, wherein it issued; and that there was no such judgment. The fault of this position is, that apparently there was a regular judgment; and there was nothing in the record of the case itself, taken by itself, to show the contrary. Thus proof being necessary to show its invalidity, it was the duty of the party desiring its aid to produce it.

The very complaint in this case tends to prove respondents' point good. A court of equity will not interfere to

Dalton v. Libby and Lamburth.

relieve against a judgment void on its face ; because relief in such form is unnecessary. If then, as in this case, the present complaint states facts sufficient to warrant a court of equity in setting aside the original judgment, does it not follow that what is good ground for relief in this case, upon the point stated, would have been equally good matter of defense to those suits, growing directly out of the original judgment; and being known and within the power of appellant to produce, as it was; does not such production become absolutely incumbent upon him? It certainly seems beyond argument that this is so. If so, then it was laches on appellant's part not to make such defense, and he cannot claim equitable interposition to remedy such neglect.

That portion of the order of the district court denying the prayer of appellant's complaint as to the judgment and decree in the case of *Peter Dalton v. William Libby and Thomas Lamburth* of date July 15th, 1871, is reversed; the remainder is affirmed, at appellant's costs.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
APRIL TERM, 1874.

J. F. COOKES, RESPONDENT, v. O. H. P. CULBERTSON, APPELLANT.

MORTGAGEE IN POSSESSION TO ACCOUNT FOR RENTS AND PROFITS. Where the circumstances show that a person in possession of real estate under a deed absolute on its face holds it in fact only as security for a debt, he will be compelled to account for the rents and profits.

STATUTE OF LIMITATIONS—ACTION ON MORTGAGE WHERE REMEDY ON DEBT BARRED. Where money is loaned without note or writing and a mortgage is given to secure its repayment, though the statute of limitations may run against an action on the debt in two years, it does not run against a foreclosure of the mortgage in less than four years.

IMPROVEMENTS BY MORTGAGEE IN POSSESSION. A mortgagee in possession is entitled to allowance for necessary and proper repairs, but he will not be credited with costly improvements, though the value of the estate be increased thereby, unless made with the mortgagor's consent.

IMPROVEMENTS IN GOOD FAITH AS OFF-SET TO RENTS AND PROFITS. If beneficial improvements are made by a person in good faith under the belief of absolute ownership, their value will be allowed him, on an accounting between him and the true owner for rents and profits.

APPEAL from the District Court of the Second Judicial District, Washoe County.

Cokes v. Culbertson.

This was an action for an accounting of the rents and profits of certain real estate in the town of Reno, Washoe County, held by defendant under a deed absolute upon its face but claimed to be a mortgage, and for a decree that plaintiff might redeem the same. There were findings and decree in favor of the plaintiff; and, among other things, that defendant had received payment, in the way of rents and profits, of his debt and of all the incidental expenses which should be allowed him, such as taxes and necessary repairs. Defendant was ordered to make a deed to plaintiff and to deliver over to him the possession of the property. Defendant moved for a new trial, which was denied; and he then took this appeal from the judgment and order.

Haydon & Cain, for Appellant.



I. The deed from Piper to Geller was not intended to be a mortgage securing a valid binding debt from Cokes to Geller; for the amount paid by Geller, \$1750, was to be refunded to him with interest at 2½ per cent. a month. Geller had no legal remedy to enforce this parol obligation to pay interest at that rate by foreclosure; but, having the deed and the legal title, he could refuse to convey the property to Cokes until Cokes complied with his terms. This makes the transaction a conveyance of the estate from Piper to Geller in fee simple absolute—with a secret parol trust by Geller to re-convey the estate to Cokes upon his due performance of the conditions of the trust on his part. Such a trust is not binding; and if therefore Geller upon non-performance of the conditions denies his trust, and there is no written agreement or document establishing it, he cannot be in equity compelled to convey, this being in the teeth of the statute of frauds. 2 Story's Eq. Jur., 637; *Lathrop v. Hoyt*, 7 Barbour, 59. Again, the defendant had no notice that Geller held only a mortgage of the property.

Cokes v. Culbertson.

By putting the absolute deed from Piper to Geller on record, they are estopped from relying on the continuance in possession as notice that Cokes was a mortgagor only. *Fair v. Howard*, 5 Nevada, 307; *Mesick v. Sunderland*, 6 Cal., 315. But the possession of Cokes was perfectly consistent with our theory that Geller held the legal title under a secret parol trust to convey the same to Cokes on his due performance of certain conditions. Geller gave Cokes ample opportunity to earn or to borrow the money that would pay him his claims against Cokes; but this, although known to defendant, was no notice of a mortgage to him.

II. The time wherein the deed might be declared a mortgage had elapsed by limitation. The debt (if there was any) from Cokes to Geller, and, according to plaintiff's theory, by novation transferred to Culbertson, was parol, and created July 18, 1870. It was therefore barred at the commencement of this action. *Espinosa v. Gregory*, 40 Cal. 62; *Hughes v. Davis*, 40 Cal. 117; *Henley v. Hotaling*, 41 Cal. 27; *Conway's Exrs. v. Alexander*, 7 Cranch, 237.

III. Whether defendant entered into possession as a mortgagee or the holder of a trust of a trust deed, he is only to account for the net proceeds of the estate. The repairs made were actually necessary, and defendant only received rents over and above necessary repairs and taxes. Without repairs it could not have rented at such a price. *Hidden v. Jordan*, 28 Cal. 301; *Hughes v. Davis*, 40 Cal. 117; 14 Wendell, 233; 15 Wendell, 248; 4 Kent's Com. 166.

IV. To declare an absolute deed to be a mortgage the evidence must be so cogent, weighty and convincing as to leave no doubt upon the mind; and such proof, and such proof alone, ought to overcome it, and not by an appeal *ad misericordiam* or the bare cry of fraud. *Bingham v. Thompson*, 4 Nev. 224; *Henley v. Hotaling*, 41 Cal. 26; *Roberts v. Ware*, 40 Cal. 636.

Cookes v. Culbertson.

Webster & Knox and R. M. Clarke, for Respondent.

I. Under the findings, which are clearly supported by the evidence, Geller became a trustee for Cookes; and the deed from Piper to Geller, though absolute in its terms, was in equity a mortgage. *Coates v. Woodworth*, 13 Ills. 654; *Page v. Page*, 8 N. H. 187; *Boyd v. McLean*, 1 John. Ch. 582; *Hidden v. Jordan*, 21 Cal. 92; *Leahigh v. White*, 8 Nev. 149; *Lodge v. Turman*, 24 Cal. 385. Parol evidence is admissible to show a deed absolute on its face to be a mortgage; and where the deed was given to secure a debt or loan, a right to redeem exists, and the case is not within the statute of frauds. *Thornburg v. Burke*, 3 Leading Cases in Eq. 624; 21 Cal. 93; *Ruhling v. Hackett*, 1 Nev. 360; 8 Nev. 147; 15 Cal. 291. A mortgagee, after receiving his debt, is considered as a trustee for the mortgagor. *Hilliard on Mort.* 359; *Pierce v. Robinson*, 13 Cal. 116.

II. When possession is taken by the mortgagee after condition broken by consent of the mortgagor, it will be presumed in the absence of clear proof to the contrary, to be with the understanding that the mortgagee is to receive the rents and profits, and apply them to the debt secured; and unless a limitation of the period of possession is fixed at the time, it will be considered as extending until the satisfaction of the debt. *Dutton v. Warschauer*, 21 Cal. 609. A court of equity will enforce a trust against all persons who, with notice of the trust, come into possession of the trust property, in the same manner and with like effect as against the original trustee. *Lathrop v. Beaupont*, 31 Cal. 17. The fact that the party receiving the conveyance of land, verbally agreed at the time with the person paying the consideration, that the former should on demand execute to the latter a conveyance of the premises, does not make the trust express, as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol under the

operation of the statute of frauds. *Breyler v. Baxter*, 22 Cal. 575-6.

III. The debt secured by the mortgage (in form an absolute deed) could be enforced by foreclosure, in an action commenced at any time within four years from the date of the mortgage, or from the maturity of the debt as secured. *Millard v. Hathaway*, 27 Cal. 146; 40 Cal. 120; *Henry v. Confidence Co.*, 1 Nev. 622; *Mackey v. Lansing*, 2 Nev. 302.

IV. The claim for the value of permanent improvements cannot be maintained and was correctly disallowed by the court. *Taylor's Landlord and Tenant*, 448. A lessee cannot bind his landlord by an agreement with a sub-lessee to pay for improvements thereon without his consent. No agreement on the part of Cooke to pay for any improvements is shown. There is a clear distinction between necessary repairs and permanent improvements.

V. Defendant was not an innocent purchaser: he had ample notice that the deed was a security for money loaned. The findings are conclusive "that this defendant had full knowledge * * * within ten days after the deed was executed by Piper to Geller, that said deed was executed, and said property was held by the said Geller as a security for the payment of said sum of \$1,750 and interest by plaintiff to said Geller." This finding is fully sustained by the testimony.

By the Court, BELKNAP, J.:

This action is brought for equitable relief and an accounting of the rents and profits of certain real property conveyed to defendant by deed, absolute upon its face, but which complainant alleges was intended as a mortgage. In the year 1868 the complainant was the lessee of an unimproved town lot in Reno. He erected buildings thereon of the value of \$2,000, retaining the right to remove them in

Cooke v. Culbertson.

case of his failure to purchase the lot for \$1,750 before the expiration of his lease. The lease and privilege of purchase would have expired July 20, 1870. Two days prior thereto, being in straightened circumstances, he borrowed this amount from one Geller for the purpose of effecting the purchase. A misunderstanding appears to have arisen in regard to the price. Complainant, however, made the purchase for \$1,750 cash, and the additional sum of \$500, for which Geller and himself gave their promissory note. A conveyance, absolute in form, but intended and treated by the parties as a mortgage, was taken in the name of Geller for the \$1,750 thus loaned. This money Geller obtained from defendant, giving a note therefor payable in ninety days. On the 16th day of May, 1871, Geller conveyed the property to the defendant. The transfer is thus explained by Geller: He was about changing his residence from Reno to the State of California. Complainant had failed to re-pay him the loan of \$1,750, and defendant still held the \$1,750 note against him (Geller). Wishing to avoid possible annoyance from distant debtor or creditor he conveyed the property by deed absolute to defendant, who was fully advised of the equitable interest of complainant. Defendant thereupon surrendered Geller's note with the understanding that the rents of the property amounting to \$135 per month were to be applied to the indebtedness secured by the deed; and upon full payment a re-conveyance should be made to Geller or complainant. Defendant maintains and testifies that the deed was taken and the note surrendered in settlement of Geller's indebtedness without notice of complainant's rights.

The district court found that the defendant took the conveyance with knowledge of Geller's relation to the property and as security for \$1,750 and accrued interest. The property in question consists of several tenements, one of which, the Capital Saloon, the complainant occupied as owner from

Cokes v. Culbertson.

the year 1868 until he relinquished possession to the defendant's lessee on the first day of May, 1871. There is a conflict of testimony as to the manner in which defendant obtained possession. He contends that he entered into possession as absolute owner of the premises; complainant, on the other hand, asserts that defendant agreed to rent the tenement in question for \$125 per month, and that this sum and the rent of another of the tenements amounting to ten dollars per month, were to be applied to Geller's indebtedness. The defendant, from his own testimony, did not agree with Geller until the 15th day of May, 1871, to take the property. His possession, then, before this time must have been that of lessee or trespasser; he could not have possessed it in his own right.

Contemporaneous with defendant's occupation of the Capital Saloon the defendant moved a stock of liquors therefrom to an adjoining tenement of the property and engaged in business there from July 6 to October 1. Upon closing his business in the last mentioned tenement, known as the Echo Saloon, he leased it and collected rent therefor. No rent was paid by him or demanded from him, nor was he ever asked to account for rents received from his lessee. Two rooms costing complainant \$250 were constructed by him in the upper portion of the Capital Saloon building and occupied by himself and family to the day of trial, for which no rent was paid or claimed. Exclusive of this he expended about \$400 in improving the property. His occupation and improvements were subsequent to May 16, 1871, the date of the conveyance, and were known to defendant.

J. C. Jones, a witness for complainant, testified that in the year 1871 he was indebted in a certain sum to one Martin. The debt was secured by a conveyance of real property. Martin demanded payment, and early in June, 1871, the witness endeavored to obtain a loan from defendant, whom he proposed to substitute for Martin. The defendant

Cokes v. Culbertson.

declined making the loan, remarking that he had exhausted his ready money in accommodating Cokes (complainant) and Geller in the same way. The witness said: "In the conversation with Culbertson I proposed to him to take a deed and relieve Martin. He then stated he had the Capital Saloon in the same way as I offered my property. He said Geller was owing him, and he took a deed of the property from Geller as security. He did not state the amount of money the security was for, but stated the interest per month to be between forty and fifty dollars. He also spoke of a lease he had of the Capital Saloon. The lease, he said, was for one year, but I cannot say whether the lease was from Geller or Cokes. He stated he agreed to pay \$125 per month for the saloon and that received from some other source—ten dollars per month—in all it was \$135 per month, which was to be applied on his debt." Upon cross-examination the witness said: "I asked him (defendant) if he thought Cokes would ever wiggle out of debt. He said, yes, in two years the property would pay for itself in rents; that anything over the interest was to apply on the principal of the debt." Further the witness said: "I am pretty certain Culbertson said he had the property as security for money loaned at two and one-half per cent. per month. He stated that he would rather have his money than the property in that way." Culbertson testifies that the conversation with Jones occurred about May 7, instead of early in June. If Culbertson's is the correct date he did not have a deed of the property at the time of the interview. He fixes the date by the improvements that were being made upon the property; Jones, by the date of his payment of Martin's loan and the re-conveyance of the mortgaged property, which occurred late in June, and two weeks after the interview. In no other respect, however, does their testimony conflict. Here is Culbertson's entire testimony upon this point: "Talked with J. C. Jones about May 7, about

letting him money. This was at the time improvements were going on. Did not tell him I had a deed as security at that time. Told him I was about making a bargain for the purchase of the property; had no deed at that time."

The taxes upon the property were delinquent in December, 1871. The defendant paid them, remarking at the time that complainant should have paid them. If either Geller or defendant owned the property, why should complainant have paid the taxes? No explanation of this circumstance was offered. Upon cross-examination, defendant admitted that in the spring of 1871 he gave complainant the refusal of purchase of the property for one year. The defendant's offer to thus deprive himself and bestow upon complainant the advantage of any advance in the value of the property for one year is irreconcilable with want of knowledge of his equities. If the legal and equitable title were in defendant, the offer thus made was void for want of consideration, and within the statute of frauds. We must presume that the proposition was valid and an admission of complainant's equities, and not an idle and insensible proposition, incapable of enforcement. These circumstances, fully established and in no wise controverted, except as stated, are strongly corroborative of the evidence adduced in support of complainant's case, and justify the finding of the district court of knowledge of his equities on the part of defendant in taking the deed.

The loan from Geller to complainant of July 18, 1870, is not evidenced by writing nor was a day fixed for its payment. It, therefore, became due immediately; and as this suit was commenced against the successor in interest to Geller subsequent to July 18, 1872, the statute of limitations was interposed as a bar, upon the theory that the rights of mortgagor and mortgagee being reciprocal and the statute having run against an action upon the debt, the mortgagor had no remedy upon the mortgage. The *remedy* upon the debt is

Cooke v. Culbertson.

barred by the statute, but the *debt* was not thereby extinguished; and as the statute of limitations of this State applies to suits in equity as well as actions at law, the creditor could have enforced payment by foreclosure of the mortgage within four years after the cause of action accrued. He had two remedies, one upon the debt, the other upon the mortgage; by losing one he does not necessarily lose the other. *Lord v. Morris*, 18 Cal. 482; *White v. Sheldon*, 4 Nev. 280; *Henry v. Confidence Co.*, 1 Nev. 619; *Muckie v. Lansing*, 2 Nev. 302.

Upon the accounting the defendant was denied a credit of \$1,000 for improvements made by his lessee. A mortgagee in possession is entitled to allowance for necessary and proper repairs, but he will not be credited with costly improvements, though the value of the estate be increased thereby, unless made with the mortgagor's consent. The law will not compel the debtor to pay for improvements he may not have desired and which might place the estate beyond his power to redeem. Where, however, beneficial improvements are made in good faith under the belief of absolute ownership, they are allowed. We have already determined that the improvements in this case were not made under such belief, nor are they shown to have enhanced the value of the estate. The questions of allowance for the management of the estate, and of tender, were not made below, and cannot be considered here.

Judgment affirmed.

Schaefer v. Bidwell.

HENRY SCHAEFER, RESPONDENT, v. JULIUS A. BIDWELL, APPELLANT.

DUE BILLS SIGNED BY SUPERINTENDENT OF MINING COMPANY. In a suit against the superintendent of a mining company on due bills signed by him, but adding after his signature "Supt. C. S. M. Co.": *Held*, that he might show that the consideration for the bills passed to the company, that the credit was given to it, that he had authority to bind it, and acted solely as such agent to the knowledge of the payers of the bills; and that the rejection of such proffered evidence was error.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

Plaintiff sued to recover \$2,840 10 on a number of due bills, made to himself and others, his assignors, in the form recited in the opinion. They were all given about the middle of the year 1867; but it appears that defendant had departed from the State soon after giving them, and did not return until May, 1872, and such absence was alleged in the complaint. The answer denied that defendant had executed the bills, and set up that he was at the time superintendent and finance agent of the Crescent Silver Mining Company, and that as such agent and on behalf of said company, and not otherwise, he signed the bills referred to. It also set up other defenses.

On the trial all the testimony tending to prove that defendant was acting in signing the bills merely as agent of the Crescent City Mining Company, and not in his individual capacity was stricken out; and an offer to prove that fact and the further facts that the consideration passed to the company and that the credit that was given to it, was rejected. The court instructed the jury that the bills were the bills of defendant, and they were not to take into consideration any evidence to show that any one else or any company was responsible for the payment of them; that it made no difference what the letters following the name of J. A. Bidwell

Schaefer v. Bidwell.

on the bills meant ; that the court had given the legal construction to the bills and was alone responsible for doing so, and the jury was bound to apply the law as given by the court.

The jury, under the instructions, found a verdict in favor of plaintiff on the small bills for \$442 10; and on the bill for \$2,110, claimed to be due plaintiff himself, "in favor of defendant, believing that it never existed." Judgment was entered upon the verdict for the sum so found due and interest amounting in all to \$740, and costs and disbursements amounting to \$3,683 50. The sheriff's fees were set down in the cost bill at \$2,954 50; but they were afterwards on motion reduced to \$94 50, making the costs in the aggregate \$823 50.

Defendant appealed.

Pitzer & Corson, Bishop & Sabin and A. B. Hunt, for Appellant.

I. There is sufficient appearing upon the face of the due bills, to show that the engagement of Bidwell was that of an agent and not that of a principal. The form of the bills, dating them at "Crescent Mill" and adding "Supt. C. S. M. Co.," bring the case clearly within those of *Carpenter v. Farnsworth*, 106 Mass. 560; *Hovey v. McGill*, 2 Conn. 680; 1 *Parsons on Bills and Notes*, 97; *Houghton v. National Bank of Elko*, 24 Wis. 663; *Means v. Dwainsted*; 32 Ind. 87; *Gillig, Mott & Co. v. Lake B. R. Co.*, 2 Nev. 321.

II. There was at least sufficient appearing upon the face of the paper to make it doubtful whether or not the person signing intended to bind himself individually or only to engage as agent; in which case all the evidence offered was admissible for the purpose of resolving that doubt and showing the true nature of the transaction. 1 *Parsons on Bills and Notes*, 94-95; *Mechanic's Bank v. Bank of Colum-*

Schaefer v. Bidwell.

bia, 5 Wheat. 326; *Haile v. Pierce*, 32 Maryland, 327; *Hicks v. Hinde*, 9 Barbour, 528; *Mott v. Hicks*, 1 Cowen, 513; *Sayre v. Nichols*, 7 Cal. 535; 1 N. J. 683; 2 Ala. 657; 6 J. J. Marsh, 31; 5 B. Mon. 51; 17 Wend. 40; 9 Grat. 68; 29 N. Y. 619; 21 Ind. 90.

J. C. Foster and *G. S. Sawyer*, for Respondent.

No brief on file.

By the Court, WHITMAN, C. J.:

Respondent claimed and had recovery on certain bills, of which the following is a sample in form :

"\$50.00. One day after date, due Henry Devann fifty dollars, value received.

J. A. BIDWELL,

"Supt. C. S. M. Co.

"CRESCENT MILL, June 18th, 1867."

The appellant, under proper averments in his answer, sought to prove that the consideration for the bills passed to a corporation, of which he was the superintendent; that the credit was given to it; and that he had authority to bind it by the bills, and acted solely as such superintendent to the knowledge of the world, and especially to that of the payees of the bills and respondent, their assignee. The proffered evidence was rejected, and the jury instructed that the bills were the individual paper of appellant. There was enough on the face of the bills to entitle appellant to make the desired proof. *Gillig, Mott & Co. v. Lake Bigler Road Co.* 2 Nev. 214. To refuse its admission was error. The jury were deprived of proper evidence, and wrongly instructed. The judgment is reversed, and case remanded for a new trial.

Youngs v. Hall

**SAMUEL YOUNGS v. W. H. HALL, TREASURER OF ES-
MERALDA COUNTY.**

ESMERALDA COUNTY REDEMPTION-FUND ACTS NOT UNCONSTITUTIONAL. The statutes of 1867 and 1869, creating a fund and providing for the redemption in a certain manner of outstanding indebtedness of Esmeralda County (Stats. 1867, 76; 1869, 58), are not in violation of the constitutional provision (Art. IV., Sec. 20) against "special and local laws regulating county business," nor do they impair the obligation of contracts.

LAWS "REGULATING COUNTY BUSINESS." A statute prescribing the manner in which the payment of the indebtedness of a county shall be conducted is a law regulating county business.

SPECIAL STATUTES AS OPPOSED TO PUBLIC OR GENERAL. The words "public or general" on the one hand, and "private or special" on the other, as applied to statutes, are convertible terms; so that the word "special" when used is as much the antithesis of "public" as it is of "general."

A GENERAL STATUTE NEED NOT BE APPLICABLE TO ALL COUNTIES. A statute, to be general, must be operative alike upon all persons similarly situated; but it need not be applicable to all the counties in the state.

ESMERALDA COUNTY REDEMPTION-FUND ACTS GENERAL STATUTES. The statutes providing for a redemption fund in Esmeralda County (Stats. 1867, 76; 1869, 58) are applicable to all persons sustaining the relation of creditors to Esmeralda county, and are therefore general as contradistinguished from special laws.

CONSTRUCTION OF CONSTITUTION, ART. IV., SEC. 20—GIVING EFFECT TO EVERY WORD. As in expounding a constitutional provision such construction should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant; full and distinct meaning should be given to each of the words "local" and "special" in the constitutional provision against "local and special laws regulating county business."

DISTINCTION BETWEEN LOCAL AND SPECIAL STATUTES. A statute may be special and not local, or it may be local and not special.

LOCAL STATUTE, WHAT. A local law is one relating, belonging or confined to a particular place as distinguished from general, personal or transitory.

ESMERALDA COUNTY REDEMPTION-FUND ACTS NOT LOCAL STATUTES. The statutes providing for a redemption fund in Esmeralda County (Stats. 1867, 76; 1869, 58) as they embrace all persons holding a certain species of property irrespective of locality, and operate as to such property as well without as within Esmeralda County, are not local laws.

Youngs v. Hall.

STATUTES CHANGING APPLICATION OF INCOMING REVENUE DO NOT IMPAIR OBLIGATION OF CONTRACTS. Where there were a number of warrants outstanding against a county and payable out of its "general fund," and certain new statutes were passed providing that the revenues to be collected, which would otherwise have gone into such fund, should constitute a "redemption fund" for the payment of such warrants as should be offered at the lowest price: *Held*, that, as the holders of such outstanding warrants never had any security for payment except the good faith of the State, and as the legislature had entire control over revenues to be raised, the statutes in question did not impair the obligation of any contract.

LEGISLATIVE CONTROL OVER REVENUES TO BE RAISED. Though the legislature cannot deprive a creditor of funds raised for the payment of his demands and to which he has a vested right, it can designate purposes, other than the payment of such creditors, to which the revenue thereafter to be raised shall be applied.

This was an original application to the Supreme Court for a peremptory writ of mandamus to compel the defendant to pay four warrants for the aggregate sum of four hundred dollars and upwards, drawn on the "general" and "redemption" funds of Esmeralda County in 1865, 1866, and 1867. Petitioner set forth in his affidavit a presentation of said warrants, demand for payment and refusal on January 2, 1873, and alleged that there was then money in the treasury applicable to the payment thereof. Upon the filing of the petition, the defendant was required to show cause on March 10, 1873, why a peremptory writ as prayed for should not be awarded.

Thomas Wells, for Petitioner.

I. The only objection which can be urged against the issuance of the peremptory writ as prayed for, is founded upon the statutes of 1867, 76, and 1869, 58. These statutes, so far as they bear upon the case, constitute one law, but are unconstitutional and void; because they impair the obligation of the contracts existing, when they were passed, between the County of Esmeralda and the three holders of

Youngs v. Hall.

the warrants of said county, including the plaintiff and the warrant set out in the petition herein. The warrant here was a contract; a contract which bound the county to pay the \$80 as soon as the warrant was presented, if then in funds; if not, thereafter in the order of its registration, when in funds, with interest from date of registration. 2 Kent's Com. 605; *Sturges v. Crowninshield*, 4 Wheaton, 197. As, if the payor of a note fail to perform the obligation of his contract, the payee may compel him by suit and the legislature cannot interfere; so also, if a county fail to pay its warrant in the order of registration when in funds, the payee may compel it by mandamus, and the legislature cannot prevent it, save by a funding act. 9 Cal. 81; 16 Cal. 11; 6 Cal. 650; 28 Cal. 429; *Fletcher v. Peck*, 1 Nebraska, 373; 6 Cranch, 87; *Van Hoffman v. City of Quincy*, 4 Wallace, 535; *Green v. Biddle*, 8 Wheat. 84; *Bronsen v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Ogden v. Saunders*, 12 Wheaton, 214; 3 Parsons on Contracts, 555; Bouvier's Law Dict. 652; Sedgwick on Stats. and Const. Law, 652; Story on Constitution, Sec. 1385, *et seq.*

II. The acts in question are in contravention of the constitution, wherein it is provided that "the legislature shall not pass local or special laws * * * regulating county * * * business." Art. IV., Sec. 20. What is county business? In general terms it may be said that levying, assessing and collecting county taxes, taking care of county funds and prosecuting criminals are component parts of county business, for the transaction of which compensations are legally made to the various officers of each county entrusted therewith. It includes clearly the auditing and paying of county indebtedness. And it is just as clear that the acts are both local and special; local in that they are confined to Esmeralda County in their operation; and special, in that they specially enjoin official duties upon the county commissioners, county auditor and county treasurer, in the

Youngs v. Hall.

transaction of county business, not required by, but in derogation of, the general laws of the State upon that subject.

III. The acts are general, or else they are local or special, or both. If general, the courts must take judicial notice of them and must, therefore, take judicial notice that a similar emergency, in the judgment of the legislature, called for similar, essentially the same, legislation, at different times, for a majority of the organized counties of the State, to wit: Lander, Storey, Ormsby, Lyon, Esmeralda, Humboldt, and White Pine. If the system of repudiation and injustice adopted in these special acts is to be sanctioned and enforced in any form, respect should be had to some extent at least for the spirit and positive letter of the fundamental law, by the passage of a general redemption and repudiation act, cherishing bad faith and entailing gigantic prodigality in the administration of county governments.

R. S. Mesick, for Defendant.

I. The legislature has authorized the collection of the county taxes of Esmeralda County ever since the year 1867 only upon the conditions specified in the acts of 1867 and 1869. It has therein by precise and definite terms prohibited the payment of the warrant in question by the defendant in the manner demanded by the petitioner, or otherwise than is specified in said acts; and such prohibition was within the scope of legislative authority. *Rose v. Estudillo*, 39 Cal. 274; *McCauley v. Brooks*, 16 Cal. 34; *McDonald v. Maddux*, 11 Cal. 187; *Hunsacker v. Borden*, 5 Cal. 288; *McDonald v. Griswold*, 4 Cal. 352; *State v. St. Louis Co. Court*, 34 Missouri, 546; *Sharpe v. Contra Costa Co.*, 34 Cal. 285.

II. These acts are not obnoxious to section 20 of Article IV. of the constitution, which forbids the passage of any local or special law "regulating county and township busi-

Youngs v. Hall.

ness," nor to sec. 21 of that article. Laws directing the mode and conditions under which creditors of a county may obtain money from the county treasury upon their claims, are not necessarily laws regulating county business. The acts in question may incidentally and in some vague sense affect county business; yet their effect in this direction is by no means as great or as direct as is the tendency of limitation laws in impairing the obligation of contracts, which are nevertheless held to be not in violation of the constitutional prohibition against the passage of laws impairing the obligation of contracts, because such is only their incidental effect and not their general or direct object and result.

III. The purpose of the acts is liquidation of county indebtedness; and we are not at liberty to confound the term liquidation with the term "business." Liquidation and business seem to be separate and distinct things and ought not to be confounded, and especially not when the result is to bring about a conflict between the statute and the constitution. If this distinction between business and liquidation be just, it can make no difference whether the acts in question are or are not local or special.

IV. But the acts are neither local nor special within the meaning of the constitution. They are not local, because their effect is not limited to any locality. They lay down no rule which is circumscribed in its effect by the boundaries of the county. Nor are they special when judged by the rules and tests usually applied. There exists no presumption or evidence that any other county was similarly situated with Esmeralda or in a condition requiring or warranting the passage of such acts in its behalf. They therefore were as broad as the occasion and as much general laws as though applied to other counties then standing in need of it. No special creditor or class of existing creditors was selected

Youngs v. Hall.

out and provided for, but all were equally affected. The acts, then, being made to apply to all presumptively similarly situated and to all existing liabilities, and being for the purpose of keeping the county government in motion, they are as general as the occasion required or the subject matter permitted, and therefore cannot be considered special. See *State v. Lean*, 9 Wis. 284-289, and authorities cited therein; *Clark v. City of Janesville*, 10 Wis. 176-183; *State v. Commissioners of Baltimore County*, 29 Maryland, 516.

By the Court, BELKNAP, J.:

This is an application for a peremptory writ of mandamus requiring the treasurer of Esmeralda County to pay certain warrants drawn by its auditor in the years 1865, 1866 and 1867, out of the general fund of the county. At the time of the allowance of the indebtedness evidenced by these warrants it was payable out of the general fund, but payment was not made for want of funds. Subsequent legislation created a "Redemption Fund" for Esmeralda County and directed that all moneys should thereafter be paid into it, which theretofore had been directed to be paid into the general fund. Certain county officers are authorized and required under specified conditions to invite and accept proposals for the surrender of outstanding warrants of indebtedness. Preference is directed to be given to the proposal that offers the largest amount of indebtedness for the least amount of money. Stats. 1867, 76; Stats. 1869, 58. The respondent justifies his refusal under these laws. The petitioner contends that they are exposed to constitutional objection; first, because they are special and local laws regulating county business, in violation of Art. 4, sec. 20 of the constitution; and, second, because they impair the obligation of contracts. The payment of the indebtedness of a county is a part of the business

Youngs v. Hall.

of the county; and a law prescribing the manner in which that business shall be conducted is a regulation of its business. Assuming then, that these laws regulate county business, we are to ascertain whether they are special or local laws within the meaning of the constitution of this State.

First. Whatever definition may be given to the word "special" by lexicographers we must consider that it is employed in reference to statutes in the light of its received judicial construction. At common law statutes were classified as public or general, and private or special. 1. Bl. Com. 86. This was the principal classification of statutes, and the words "public or general" and "private or special" were used synonymously. "A general or public act," says Blackstone, "is an universal rule that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio* without the statute being particularly pleaded or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns." Book 1, 86. Mr. Sedgwick in his work upon statutory and constitutional law (p. 30) thus speaks of the division of statutes: "When we come to consider statutes not as to their origin, but with reference to their subject matter, we find the leading division to be into public or general and private or special. Public or general statutes are in England, those which relate to the kingdom at large. In this country they are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraints. Private or special statutes relate to certain individuals or particular classes of men." In Smith's Commentaries on statutes (sec. 802) Blackstone's definition is adopted. That of Dwarrris is of like effect: "Public acts relate to the public at large, and pri-

Youngs v. Hall.

vate acts concern the particular interest or benefit of certain individuals, or of particular classes of men." Again, "a general or public act regards the whole community; special or private acts relate only to particular persons or to private concerns;" also, "general or public acts are to be noticed judicially without pleading, and special acts must be shown by pleading." Potter's Dwarries on Stats., pp. 53, 55. These illustrations from approved text writers we consider sufficient to establish the fact that "public or general" and "private or special" as applied to statutes are convertible terms. See *Clark v. City of Janesville*, 10 Wis. 136. In distinguishing statutes the earlier decided cases in this country generally employ the words "public and private," although "general and special" are frequently met with; and when the word special is used it is as much the antithesis of public as it is of general.

The question arose in New Hampshire whether a statute of that state regulating the mode of putting timber into the Connecticut river was a general law. The objection to the statute was that it did not embrace all rivers, but was confined to the Connecticut river. The court held that since the law extended to all persons it was a general law in relation to a particular place. *Scott v. Willson*, 3 N. H. 321. In *Heridia v. Ayres* the supreme judicial court of Massachusetts decided that an act regulating the pilotage of Boston harbor was a public act. The views of the court upon this point were thus expressed by Chief Justice Shaw: "The last objection is that the statute is a private act and ought to have been recited in the declaration. Without going minutely into this subject, which sometimes involves distinctions of much nicety and difficulty, there is one consideration which renders it decisive that this is a public act, which is, that the first section in terms imposes a penalty upon every person who shall violate its provisions. It is therefore binding upon every citizen of the commonwealth,

Youngs v. Hall.

and upon every stranger who, coming within its jurisdiction, owes a temporary allegiance and is bound by its laws." 12 Pick. 334. In *Pierce v. Kimball*, 9 Greenl. 54, a statute forbidding the sale or purchase of lumber in Penobscot County not surveyed and marked in a particular manner was considered a public law. - The court saw nothing in the act that was not intended as a public benefit, of which all of the citizens of the state as well as others might equally participate. In *Burnham v. Webster* the court was of opinion that a law regulating the taking of bass in Dunston river was a public law. Parsons, C. J., said: "It is obligatory on all the citizens, and they must notice it at their peril. We must, therefore, *ex officio*, take notice of it." 5 Mass. 265.

The constitution of Indiana provides that special laws shall not be passed "for the punishment of crimes and misdemeanors," etc., and "regulating the practice in courts of justice;" and by statute the courts of common pleas are invested with original jurisdiction of all misdemeanors. An act was passed regulating the liquor traffic, declaring any infraction of the law a misdemeanor, and conferring concurrent original jurisdiction upon the circuit courts of cases prosecuted for its violation. It was objected that the act was special and, therefore, unconstitutional, because it conferred jurisdiction upon both courts to try offenses under this act only, without giving the like jurisdiction as to all other misdemeanors. Said the court: "What is a special act? It is such as at common law the courts would not notice, unless it were pleaded and proved like any other fact. * * * * * The distinction between general and special statutes was well known to the common law, though sometimes a question of great nicety, and it is in accordance with a well established principle to assume that the constitution in using the terms intended them to be understood in the sense which was at that time recognized by the courts. Now we apprehend that it will be impossible anywhere, to find

Youngs v. Hall.

a decision by any respectable court, to the effect that an act is required to be pleaded which confers jurisdiction for the punishment of a particular misdemeanor, in all cases, though the court thus empowered could not take cognizance of other misdemeanors." *Hingle v. The State*, 24 Ind. 28. Afterwards the same court resolved that an act of the legislature providing that judgments against railroad companies for stock killed should be enforced in a specified manner, different from other judgments, was not a special act. *Toledo, Logansport & Burlington Railway Co. v. Nordyke*, 27 Ind. 95.

The question arose in Iowa whether a law was special which provided that "every railroad company shall be liable for all damages sustained by any person, including the employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employees of the corporation, to any person sustaining such damage." It was contended that the law was special because it did not impose the same liability upon stage companies, the proprietors of steamboats and other common carriers; to which the court replied: "These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relation and circumstances provided for, is affected by the law." *McAnnick v. M. & M. Co.*, 20 Iowa, 343. In the case of the *U. S. Express Co. v. Ellyson*, 28 Iowa, 370, an act providing for the assessment of the property of express and telegraph companies in a particular manner was held to be a general law. Again, an act of the legislature establishing a court at the town of McGregor was adjudged a local but not a special act. *Town of McGregor v. Baylies*, 19 Iowa, 43. Under the Maryland constitution, prohibiting local and special legislation in certain cases, a law relating to roads in Baltimore County was declared to be a local but not a special law. The court considered that the special laws contemplated by the constitu-

Youngs v. Hall.

tion were those that provide for individual cases. *Webster v. County Comms.*, 29 Md. 516.

It is objected that the redemption acts are special, since they provide for the indebtedness of one county only; but under the decided cases it appears that a law operative alike upon all persons similarly situated is a general law. The recent case in 19th Iowa and that in 29th Md. *supra*, decided under similar constitutional clauses, show that a law to be general need not be applicable to all counties in the state. The statutes before us are applicable to all persons sustaining the relation of creditors to Esmeralda County, and thus meet the requirements of general, as contradistinguished from special laws. And see *Clarke v. Irwin*, 5 Nev. 111.

Second. In expounding a constitutional provision such construction should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant. Smith's Com. Sec. 276. Applying this rule to a similar constitutional clause, the court of appeals of New York said: "We judge that they (the constitution framers) employed the word private as applicable to persons only; and the word local as applicable to territory only; but both as signifying a narrowing or restricting of purpose." 43 N. Y. 18. This language is as apposite to the words "special and local" in the Nevada constitution, as it is to the words "private and local" in the New York constitution. A law may be special and not local, or it may be local and not special. The adoption of this view is necessary to give full meaning and significance to the words special and local; otherwise the terms become convertible, and the word local is unmeaning and useless in the constitution. The classification of statutes as local is of late origin and not mentioned by text writers, who designated laws restricted to particular localities as private or special. The subject, however, has been frequently discussed by the courts of New York under the following constitutional clause: "No private or local

Youngs v. Hall.

bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." N. Y. Const., Art. 3, Sec. 16. Unaided by the books, the courts resorted to the meaning with which the word local was charged by the constitutional convention and the definition given it by lexicographers. Burrill defines it as follows: "Relating to place; belonging or confined to a particular place; distinguished from general, personal or transitory." Adopting this definition a statute relating to the city of Rochester was declared a local act. In pronouncing the decision the court said: "This act is purely local in its application. It has no force beyond a particular city or county, and is, therefore, confined to a particular locality. It is not general and has no application except to the common council of a particular city." *People v. Hill*, 35 N. Y. 449. And afterwards, an act amending the charter of the city of New York, enabling the board of supervisors to raise money by taxation, was adjudged a local law because it had no force outside of the territory embraced in the corporation, nor any possible effect upon property not within the corporate limits, or upon any person not for the time being within such limits. *People v. O'Brien*, 38 N. Y. 193. The court of appeals of Maryland, after ascertaining the special laws contemplated by their constitution, considered that local laws were applicable to all persons, but distinguished from general laws because confined in their operation to certain prescribed or defined territorial limits. 29 Md. *supra*. See also *People v. Supervisors, etc.*, 43 N. Y. 10; *Huber v. People*, 49 N. Y. 132.

The laws under consideration are not restricted by geographical lines; they have force without as well as within the boundaries of Esmeralda County. They provide as much for the relief of the creditors of the county as for the county itself; and are as applicable to the creditor who resides elsewhere in the State, or without it, as they are to the creditor

Youngs v. Hall.

resident in Esmeralda County. They embrace and operate uniformly upon all persons holding a certain species of property, irrespective of locality. We cannot, therefore, consider them local laws. It is true that but one locality in the State can have the advantage of these particular laws. Their purpose is local, but a law having a local purpose is not necessarily a local law. Should the legislature appropriate funds of the State for a local improvement, as a bridge over a particular river, the law would be local in its purpose, but not a local law. This distinction is recognized in the constitution of the State of New York, which provides, in addition to art. 3, sec. 16, already quoted, that "the assent of two-thirds of the members of each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." Art. 1, Sec. 9.

Third. The remaining objection is that the redemption acts impair the obligation of contracts. The petitioner has not and never had any security for the performance of the county's contract, but the good faith of the State. The legislature has permitted suits to be brought against counties, but has not provided for the enforcement of executions. The only effect of a judgment is to convert a disputed into a liquidated demand, and the creditor must still rely upon the revenue for payment. It is within the legitimate power of the legislature to raise revenue by taxation and to designate the purpose to which the funds shall be applied. In the exercise of this authority the legislature has directed that moneys which would otherwise have been paid into the general fund shall go into the redemption fund, to be from thence disbursed in a specified manner. The revenue is controlled by the legislature. It cannot be coerced to enact revenue laws, and has power to repeal laws for its collection and thus defeat the payment of the creditors of the State or counties. The good faith of the State is the only reliance of

Youngs v. Hall.

its creditors. It should be added that the legislative control of the revenue does not extend to depriving the creditor of funds raised for the payment of his demand, to which he has a vested right. *Sharp v. Contra Costa County*, 34 Cal. 284; *Rose v. Estudillo*, 39 Cal. 270; *McCauley v. Brooks*, 16 Cal. 11. The application for a mandamus is denied.

By HAWLEY, J., dissenting:

To my mind the acts creating a "Redemption Fund" for Esmeralda County are clearly within the prohibitions of sec. 20, art. IV., of the constitution, that "the legislature shall not pass * * special laws * * regulating county * * business." In examining the authorities, we find that public or general acts are those "which relate to or concern the interest of the public at large, or relate to a general *genus* in relation to things," while private or special acts are those which concern only a particular species, thing, or person, such as "acts relating to any particular place, or to divers particular towns, or to one or more particular counties." This is the general definition found in all authorities both in England and in the United States. *Holland's Case*, Coke's Rep. Vol. 2, Part IV. 76, p. 473; Smith's Comm. Secs. 795, 796; Sedgwick on Const. Law, p. 32; Potter's Dwarrris on Stat. p. 53; *The People v. Supervisors of Chautauqua*, 43 N. Y. 17; *State of Mo. ex rel. Dome v. Wilcox*, 45 Mo. 465. See also reference to English cases in 9 Petersdorff's Ab. 191, note.

A distinction to this rule is sometimes made in certain cases where the laws in their operation are limited or local, but they are treated as public, because, although limited to a particular locality, yet "they affect the public at large when acting within that locality in reference to matters within the purview of the act." Smith's Comm. Sec. 797. Acting upon this principle, courts have usually declared as general, all acts relating to highways or navigable waters,

Youngs v. Hall.

for these "are common to all the people of the state and concern them generally." 1 Caine's Cases in Error, 92. Acts which are passed to preserve the public health or protect the public peace in certain cities, especially where such acts impose penalties on all persons offending against them, have been held to be public statutes of which courts would take judicial notice. These and kindred laws are public in their nature and character, and their operations affect the whole community.

The laws under consideration are not, in my judgment, of like character. They are limited in their application to the County of Esmeralda and its individual creditors, and do not affect strangers or the public at large. They are special within the meaning of that word as used in the constitution, because the subject matter relates to one county and its individual creditors; to a portion of the people of the State and to their property, and do not either in their subject, operation or immediate and necessary results, affect the people of the State or their property in general. Nor do I think these acts come within that other class of cases that have been held to be general, because of uniform operation throughout the State and affecting all persons similarly situated alike. Under this distinction, laws which applied to all railroads without mentioning other corporations, have been upheld as general, because applying to all railroads in the State. But the laws regulating the indebtedness of Esmeralda County are not made applicable to other counties similarly situated. Nor to the creditors of other counties. Within the principle of this latter class of cases, the legislature might pass an act dividing the counties of the State into one or more classes, and a law would be general which conferred upon counties of one class certain rights, powers and privileges, not conferred upon counties of another class. But a law would be special which conferred upon one county special powers and privileges not conferred upon all counties

State v. Silver.

of the same class. If not so divided then the law to be general must apply to all counties in the State.

It will be observed that I do not differ so much with the general principles announced in the opinion of the Court as in the application of the law. Here it is that our paths diverge. I think the laws are special, because they are limited in their application, by the subject matter, to a particular county, and to particular individuals. The fact that these laws affect all the creditors of Esmeralda County may take from them their local character, but does not, in my opinion, avoid their being special. There is no discretion in regard to the passage of such laws. If special or local, they are inhibited by the strict letter of the constitution; and entertaining the opinion that the laws are special, I am compelled to dissent from the judgment of the Court.

THE STATE OF NEVADA, APPELLANT, v. FRANK SILVER, RESPONDENT.

STATUTE TO EMBRACE BUT ONE SUBJECT—CONSTITUTION, ART. IV, SEC. 17. The design of the constitutional provision that a statute shall embrace but one subject, to be briefly expressed in the title (Const. Art. IV, Sec. 17,) is to prevent improper combinations to secure the passage of laws containing subjects having no necessary or proper relation and which as independent measures could not be carried; also to prevent the legislature and the public from being misled by the title.

STATUTE MAY EMBRACE MATTERS GERMAIN TO SUBJECT. The details of a statute need not be specifically stated in the title; but matters germane to the subject and adapted to the accomplishment of the object in view may properly be included.

PROVISION RELATING TO KILLING OF STOCK IN MARKS AND BRANDS STATUTE UNCONSTITUTIONAL. The provision in relation to the unlawful killing of stock and making it a felony, contained in the statute regulating marks and brands (Stats. 1873, 99, Sec. 10,) bears no proper relation to the subject of the statute as expressed in the title, and is therefore unconstitutional.

State v. Silver.

MALICIOUS KILLING OF CATTLE A MISDEMEANOR. Section 143 of the Crimes Act, making the malicious killing of cattle a misdemeanor, is unaffected by the provision in the act regulating marks and brands, making it a felony (Stats. 1873, 99, Sec. 10)—the latter provision being unconstitutional.

APPEAL from the District Court of the Second Judicial District, Washoe County.

Defendant was indicted for having on July 1, 1873, in Verdi Township, Washoe County, unlawfully, wilfully and feloniously killed a steer then and there running at large, with intent to defraud Christian Haller, the owner thereof, contrary to the form of the statute, etc. A demurrer was interposed to the indictment on the grounds that it did not substantially conform to the requirements of sections 234 and 235 of the Criminal Practice Act, and that the facts stated did not constitute a public offense. The demurrer was sustained; the indictment dismissed, and the defendant discharged. The State appealed.

T. Laspeyre, for Appellant.

I. Section 10 of the act regulating marks and brands, provides that any person who, with intent to defraud, kills any stock running at large, whether branded, marked or not, shall on conviction thereof be deemed guilty of a felony, etc. The killing of stock running at large, whether branded or not, has a connection with and direct reference to the subject of the act and the provision performs its office by aiding to enforce the regulation of marks and brands. The killing relates to stock with marks and brands and to stock running at large, whether branded, marked, or not.

II. In construing statutes the intention, the purpose, the object of the law-makers is to be regarded. The meaning of the law is to be adduced from a view of the whole and of every part of a statute taken and compared together. 1

Chitty's Black., Secs. 59, 60; Potter's Dwarries on Stat., 178, 189, note 1 and note 18.

III. The object of the legislature was to protect owners of a certain class of property running at large, to wit: horses, cattle, hogs, and sheep, which could not from the very nature of the property, the manner in which it is cared for, the vast and illimitable ranges of country over which it is compelled to roam to obtain sustenance, be otherwise effectually protected against thieves and lawless depredators.

IV. The constitutional provision in regard to the titles of statutes, never contemplated or intended that they should embrace all the distinct provisions of a bill in detail; for if such were the case, how awkward, bungling and cumbersome, not to say absurd, would a very large number of laws passed by the legislature of Nevada present themselves by their titles?

L. A. Buckner, Attorney-General, also for Appellant.

Webster & Knox, for Respondent.

I. If the said statute concerning marks and brands possesses any validity as a penal statute and creates a felony, the indictment is insufficient, as it does not follow the words of the statute or use equivalent words. If the offense charged be created by statute, the words of such statute or words of similar import should be used in the indictment. *People v. Logan*, 1 Nev. 115; 1 Bishop Crim. Procedure, Sec. 360, note 2; Wharton Am. Crim. Law, Sec. 364, 365, and notes e, f, g; *State v. Gardner*, 5 Nev. 377.

II. So much of the statute regulating marks and brands as attempts to create a new felony, is unconstitutional and void. There is no congruity or proper connection between the subject of regulating marks and brands and that of creating a

State v. Silver.

new crime and making it a felony to kill stock running at large, etc., and prescribing a penalty therefor. No reference is made, in the title to the act, to the subject of crimes and punishments. If section 17 of Article IV of the constitution can be disregarded by the legislature, and its action be sustained by the courts, there is no limit to the number of subjects that may be embraced in a single statute.

By the Court, BELKNAP, J.:

The respondent was indicted for unlawfully killing a steer, contrary to the provisions of the tenth section of an act of the legislature, approved February 27, 1873, entitled "an act to regulate marks and brands." Stats. 1873, 99. A general demurrer to the indictment was sustained. In support of the ruling of the district court it is argued that so much of the legislative act as relates to the killing of stock is unconstitutional and void, because in conflict with section seventeen of article four of the constitution, which declares that "each law enacted by the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."

The statute provides that the owners of stock running at large shall deliver patterns of their marks, brands and counterbrands to the recorder of the county in which the stock may be. If the patterns thus delivered to the recorder are unlike any other in the State, so far as his knowledge may extend, he is required to record them in a specified manner, and entitled to demand and receive a fee therefor. Section four imposes a penalty for willful neglect or refusal on the part of county recorders to discharge the duties imposed upon them by the provisions of the act. Subsequent sections make a certified copy of the owner's mark or brand *prima facie* evidence of his ownership of stock bearing such mark or brand; declare a liability to forfeiture of stock

State v. Silver.

branded with another's brand without his consent, and prohibit the employment of cruel marks.

A restriction similar to that contained in section seventeen of article four is imposed upon the legislatures of many of our sister states. Its design has frequently been declared to be the prevention of improper combinations, to secure the passage of laws containing subjects having no necessary or proper relation, and which as independent measures could not be carried; and, also, as expressed by Judge Gardiner in the case of *The Sun Mutual Ins. Co. v. The Mayor*, 4 Seld. 253, "that neither the members of the legislature nor the public should be misled by the title." The construction placed upon the clause is, that the details of a legislative act need not be specifically stated in the title, but matter germane to the subject and adapted to the accomplishment of the object in view may properly be included. Thus, the fixing of the officer's fee for recording the mark or brand, and the imposition of a penalty for willful neglect are matters properly connected with the enforcement of the law and the attainment of the contemplated object.

The subject of unlawful killing of stock, however, bears no proper relation to that of the regulation of marks and brands; and a statute entitled "an act to regulate marks and brands" gives no intimation, by its title, of a provision for the punishment of the unlawful killing of stock. So much of the statute, therefore, as relates to the killing of stock we consider unconstitutional.

The statute of 22 and 23 Car. II. c. 7, makes the malicious killing of cattle a felony, 4 Bl. Com. 244; but this offense is modified by section 143 of the crimes act to a misdemeanor. This section is unaffected by the unconstitutional portion of the act regulating marks and brands; the offense remains a misdemeanor, and consequently the indictment cannot be sustained as a common law indictment.

Judgment affirmed.

Dean v. Pritchard.

J. W. DEAN, APPELLANT, v. W. L. PRITCHARD, RESPONDENT.

IDENTIFICATION OF AFFIDAVITS USED ON MOTION FOR NEW TRIAL.—To entitle affidavits, used on motion for new trial, to be considered on appeal in the Supreme Court, they must be identified by indorsement of the judge or clerk, made "at the time" of use; and a certificate, made after appeal taken, will not avail.

NEW TRIAL ORDER REVERSED, IF NOT SUPPORTED.—On appeal from an order granting a new trial, if the affidavits upon which it was granted are not identified so as to entitle them to be considered, the order, having no foundation, will be reversed.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

This was an action to recover \$6,275 50 for hay sold to defendant, boarding furnished defendant's hired man, and horse feed, with interest and costs. Defendant set up a counter claim, exceeding the amount demanded by plaintiff. There was a verdict and judgment in favor of plaintiff for \$5,747 13, with interest and costs. Defendant moved for a new trial; and an order was made that if plaintiff would remit \$3,605 of his judgment, the motion should be denied; but if not, a new trial should be granted. Plaintiff declined to remit, and appealed from the order.

The transcript contained a number of affidavits, which had been used on the motion for new trial. They appear to have been served on the opposite party and service was acknowledged; but there was no indorsement upon them of having been used on the motion.

A. M. Hillhouse and W. H. Davenport, for Appellant.

The order granting a new trial will be reversed, because there is nothing in the transcript to support it. The objection to the affidavits, is that they are not certified to or identified, as required by the Practice Act, as having been

Dean v. Pritchard.

used or referred to on motion for new trial. Practice Act, Sec. 198; *Paine v. Linkhill*, 10 Cal. 370; *Stone v. Stone*, 17 Cal. 513; *Gordon v. Clark*, 22 Cal. 533; *State v. Parsons*, 7 Nev. 57; *White v. White*, 6 Nev. 20. So far as this Court can judge from the transcript, there may have been a half dozen counter affidavits used. Appellant was required to have none identified, so long as respondent did not; and affidavits not identified, like a statement not certified to, are worth nothing.

Thornton, Bailey and Wren, for Respondent.

The appellant objects to the affidavits upon the ground that they are not identified as required by the Practice Act. Is not a substantial compliance with the statute sufficient? Respondent, in his specifications of error upon motion for a new trial, "herewith tenders the affidavits of defendant and Martin Packard," virtually making them part of the statement. In his opinion on the motion, the judge refers to the affidavits, and gives the substance of them. See 30 Cal. 359.

By the Court, WHITMAN, C. J.:

The order for a new trial, from which this appeal springs, is based upon certain affidavits which are not identified as having been used upon the motion, as by statute provided. "To identify the affidavits, it shall be sufficient for the judge or clerk to indorse them at the time as having been read or referred to on the hearing." 1 Comp. Laws, 347. Objection is made by appellant to the consideration of such affidavits. To meet this objection, respondent offers a memorandum of the district judge to the desired effect, but made after the filing of the transcript in this Court. The identifi-

Newman v. Kane.

cation to follow the statute must be made "at the time" of use of affidavits ; one made after the case is in this Court cannot come within the meaning of that language by any construction, however elastic. So there are no affidavits shown to have been used on the hearing of the motion in the transcript ; consequently, no foundation for the order. *White v. White*, 6 Nev. 20. It is therefore reversed.

WILLIAM M. NEWMAN, RESPONDENT, *v.* JOHN KANE
et als. APPELLANTS.

PERISHABLE PROPERTY, WHAT.—The term "perishable property" as used in the statute providing for its speedy sale when seized on attachment (Practice Act, sec. 133) applies only to property which is necessarily subject to immediate decay ; and does not apply to property, like hay, which could with ordinary or reasonable care, appropriate to its particular species, be preserved.

SHERIFF MUST PRESERVE ATTACHED PROPERTY.—When a sheriff attaches personal property he is not allowed, under the statute, to consider the element of expense in its preservation or keeping, but is bound to have it ready to be disposed of according to the judgment, unless compelled to sell on account of its being perishable ; and it is no excuse for a failure to have it so ready that the best interests of the parties were subserved by a sale.

WRONGFUL SALE OF PROPERTY ATTACHED—TIME OF CONVERSION—MEASURE OF DAMAGES.—Where a sheriff, having attached certain hay in the field, had it baled and sold as perishable, and afterwards the person attached recovered judgment and demanded the property : *Held*, that the conversion took place at the time of sale and not at the time of demand and refusal, and that the measure of damages was the market value at the time of sale with interest therefrom.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

Newman v. Kane.

This was an action against John Kane, sheriff of Lincoln County, and the sureties on his official bond, to recover two thousand dollars as the value of fifty tons of hay alleged to have been converted by the sheriff. The case was tried before a jury, which returned a verdict in favor of plaintiff for fifteen hundred dollars, and judgment was rendered accordingly. Defendants' motion for a new trial having been overruled, they appealed from the judgment and order.

Thornton, Kelly and A. B. Hunt, for Appellants.

I. The hay, like other fruits of the soil, was perishable, both as matter of fact and matter of law, and under section 133 of the Practice Act, it was a matter of discretion with the sheriff to sell it. The court should have stated to the jury, that the hay being perishable, the sole question for their consideration was the diligence and good faith of its officer. *Crocker v. Baker*, 18 Pick. 410.

II. The rule of damages laid down by the court below was erroneous, in any view of the case, whether the action be trespass or trover. The actual sale and conversion fixed the date at which the value should be fixed. *Page v. Towle*, 39 Cal. 421; *Boylan v. Huguet*, 8 Nev. 345.

Pitzer & Corson, Bishop & Sabin and J. C. Foster, for Respondent.

I. The statute imposes upon the sheriff the duty of keeping the property attached and taken into his possession until the termination of the attachment suit. Hence the plaintiff had no right to the hay or to call for its return until the attachment suit was terminated. That suit having been decided in his favor, his right to the property, or its value, was determined. There was no violation of duty on the part of the sheriff, until a failure to return the property on demand,

or notice of the result of attachment suit. The conversion, therefore, was upon the demand and refusal to deliver. It was then that plaintiff's right of action accrued. *Boylan v. Huguet*, 8 Nev. 345.

II. Whenever there is such a tortious taking or wrongful use of property as will give an immediate right of action to the party injured, then the value of the property at the time of the conversion, with interest, is the measure of the damages; but there can be no such rule in a case of conversion at one time with a suspension of the right of action for months or years after. In other words, there can be no conversion as to a party until he either has possession of, or is entitled to the immediate possession of, the property alleged to be converted. 10 Cal. 392.

III. If the value of the hay at the time of sale should have governed the jury in the assessment of damages, the judgment can be modified, or plaintiff allowed to remit, and the case need not be sent back for a new trial. When, as in this case, the court has all the facts before it upon which it can render the proper judgment, it will not impose upon the parties the expense of a new trial.

By the Court, WHITMAN, C. J. :

Respondent's hay, in the field, was attached in a suit ultimately decided in his favor. Pending such decision, the sheriff baled and sold such hay for the sum of twelve hundred and seventy-five dollars; or twenty-five dollars per ton. In this action, respondent claiming such course to be unlawful, seeks to recover the market value of the hay at the date of his demand upon the officer, which was made after the determination of the original suit, and some months subsequent to the sale. The jury were instructed if they found for the respondent, to find such price, deducting therefrom

Newman v. Kane.

five dollars per ton as the expense of baling, provided under the evidence they deemed such work necessary to preserve the hay. The appellants insist that it is for the sheriff to decide, under the statute, what property shall be sold as perishable; and that property which will deteriorate in value, or which is expensive or difficult to preserve, comes within the proper and received definition of the word "perishable." The court sustained the opposite view, and instructed the jury that the sale could not be justified, unless it plainly appeared that the property sold was perishable, and could not be preserved by any reasonable care. Upon this theory, certain evidence offered by appellants was rejected, and other action had, which was error, if the general position be untenable. In ascertaining that point, all other objections are involved, and it would be useless to discuss them particularly.

What is, or is not, perishable property, is a question which has been answered with considerable latitude; and generally, whether by express statutory provision or judicial interpretation, the elements of cost in preserving or danger of waste or deterioration in keeping have weighed in favor of sale. Thus in Alabama, a statute permitting a sale, prior to judgment, of property, "clearly of a wasting and perishable nature," or which would "be likely to waste or be destroyed by keeping," was held to allow the sale of slaves attached. *Millard's Adm'rs. v. Hall*, 24 Ala. 209. In most of the states of this Union, however, the statutes are either more liberal in language or more properly susceptible of a latitudinarian construction, than in this. The statute of Nevada provides: "If any of the property attached be perishable, the sheriff shall sell the same in the manner in which such property is sold on execution." Such property is sold on execution "by posting written notice of the time, and place of sale in three public places of the township or city where the sale is to take place, for such a time as may

Newman v. Kane.

be reasonable, considering the character and condition of the property." This language is used undoubtedly to cut off all construction, and evidently confines the right to sell to such property as is necessarily subject to immediate decay; else the large authority to the sheriff as to time of notice would never have been given: that attaches to property about which there is no time to deliberate, no occasion to ask an opinion, or order; no opportunity to pursue the usual forms. It was not intended to apply to such property as could with ordinary or reasonable care appropriate to the particular species be preserved; nor is the officer under the statute allowed to consider the element of expense in preservation or proper keeping; it is his duty to have the attached property ready on execution or on demand of defendant if he has recovered in the action; unless compelled to sell because perishable; and it is no excuse for failure in this regard, to claim or show, if such showing were possible or permitted, that the best interest of the parties was subserved by a sale. Of that the officer has no authority to judge; if he can, as before stated, keep the property, he must do so.

It might probably, frequently does, happen that the expense of feeding or otherwise keeping or properly caring for live stock under attachment, is more than its value; and so with goods of divers kinds and many varieties of personal property; but the section under which the sheriff acted has made no provision for sale in any such case. If in any such, relief is desired, it can be had upon proper showing, under section 595 of the Practice Act. Here, perhaps, the respondent was benefited by the sale of his hay; nevertheless the officer was acting wrongfully in selling it, provided he could with ordinary and reasonable care under the surrounding circumstances have preserved it. The jury have found that he could have so done; they have also found that for its preservation baling was necessary. The only ques-

Newman v. Kane.

n that now remains is, what damages for this wrong the respondent should recover in compensation. He insists that he had no right of suit until judgment in his favor; consequently there was no conversion as to him until his demand and refusal of the sheriff; and that his damages should be the value of the hay at that date, with interest therefrom. If he were right in his premises, he might be sound in his conclusion; but the conversion was actual at the time of the sale; and that must override the constructive wrong arising from demand and refusal. Of course, he had no immediate right of possession in the property under the sheriff's keeping until the lien of the attachment was raised; but the gist of his action is upon the assumption that the attached property was wrongfully sold and ceased to have an existence in the action; then it would follow, that as the general owner of the property, though temporarily deprived of its possession by the lien of the attachment, he had a right to immediate decision as to his damages; though the payment thereof to him might be dependent on the result of the original suit. *Briggs v. Taylor*, 35 Vt. 57. So the damages in this case should have been measured at the market value of the hay at date of sale, with interest on the amount therefrom; for then occurred the conversion. *Boylan v. Huguet*, 8 Nev. 345.

This, by the evidence, appears to have been twenty-five dollars per ton, or as stated in gross in the answer, twelve hundred and seventy-five dollars; deducting therefrom the price of baling, which the jury find as a necessary expense to the preservation of the hay and proven to have been five dollars per ton, and amounting to two hundred and fifty-five dollars, there remains the sum of one thousand and twenty dollars, which the respondent should have recovered in this action, together with interest on such sum from the date of conversion. As the respondent is willing to have the judgment modified without reference to this question of interest,

The 420 Mining Co. v. The Bullion Mining Co.

which does not seem to have been considered at the trial, provided it be proper to modify the judgment in any respect, it would be futile to order the case re-tried.

Let the principal judgment then be modified by deducting therefrom such sum as will reduce it to one thousand and twenty dollars, and let that amount stand *nunc pro tunc* as the original judgment. The district court will make the necessary orders to carry out the judgment of this Court.

The respondent will pay costs of this appeal.

THE 420 MINING COMPANY, APPELLANT, v. THE
BULLION MINING COMPANY, RESPONDENT.

ACTS OF CONGRESS RELATING TO MINING CLAIMS—JURISDICTION OF STATE COURTS. The object of the acts of congress of July 26, 1868, July 9, 1870, and May 10, 1872, in relation to the location of mining claims, was not to confer any additional jurisdiction upon the state courts, but to require parties protesting against the issuance of a patent to try the right of possession and have the controversy determined in the state courts by the same rules, and governed by the same principles, and controlled by the same statutes, that apply in other cases.

STATUTE OF LIMITATIONS AS TO MINING CLAIMS. The act of congress of 1872, in relation to the location of mining claims and the determination of the right thereto in case of conflict (U. S. Stats. 1872, 91, Sec. 7), does not prevent the application of the state statute of limitations: on the contrary, an actual, exclusive and uninterrupted adverse possession for the statutory period constitutes a complete bar.

PENDENCY OF EJECTMENT DOES NOT ESTOP PLAINTIFF FROM CLAIMING ADVERSE POSSESSION. The pendency of a suit to recover possession of real estate does not estop the plaintiff, in case of a suit subsequently commenced against himself, from setting up the statute of limitations and claiming rights and privileges under it.

The 420 Mining Co. v. The Bullion Mining Co.

FORCIBLE POSSESSION—NO INFERENCE OF HOLDING AS TENANT IN COMMON WITH PERSON OUSTED. Where a person, who had brought a suit in ejectment for a mining claim, afterwards forcibly ousted defendant and thenceforward held actual and exclusive possession: *Held*, in a subsequent suit by the party ousted, that it was not to be inferred that the party ousting did not hold such possession adversely to the party ousted.

APPEAL from the District Court of the First Judicial District, Storey County.

The property in controversy in this case consisted of four hundred and twenty feet of mining ground on the Comstock Ledge, next south of the Chollar claim, in Storey County. The facts are fully stated in the opinion. There was a judgment for defendant. Plaintiff moved for a new trial, which was refused, and it then appealed from the judgment and order.

Lewis & Deal, for Appellant.

I. The statute of limitations of this State cannot have any application, because no act of a state can cut off or limit rights conferred on the citizen by the federal government. The act of congress authorizing the location of mining claims confers upon the locators certain rights, under certain conditions. When these conditions are performed by the miner, state laws cannot deprive him of rights so conferred. To hold that it can is to make the state superior to the federal government in the disposition of its own property; to invest the state with the power of defeating the bounty of congress, and to virtually annul its laws. Take the case of a pre-emptor: surely if he has complied with all the acts of congress, it cannot be successfully maintained that the state can by any character of act deprive him of his right to a patent upon his application for one. That case is no stronger than this.

II. Again, the statute pleaded in this action is the statute governing the recovery of the possession of mining claims. That is not the character of this action. This is an action authorized by an act of congress and is simply to try the right to patent or rather to determine who has the better right under the acts of congress and the rules and regulations of miners. It may be admitted that congress cannot confer jurisdiction on a state court; but it is not necessary to claim that it could. The court, by virtue of its common law powers, would have jurisdiction of the question without such act. But when it assumes jurisdiction in such case, it must look to the acts of congress to ascertain the rights of the parties; congress has full power to make the decisions of the local courts on any such questions binding on its land officers; and this is about all the act of congress amounts to in the matter of jurisdiction. It does not confer jurisdiction, but only provides that the decision of the state courts shall be received by the officers of the land office as evidence upon the question as to which party may be entitled to a patent. It confers rights upon persons taking up a mining claim, doing a thousand dollars' worth of work on it, and who conform to the requirements of the rules and regulations of the miners. How then can an act of the State deprive a person, who has brought himself within the acts of congress, of the rights so conferred on him?

III. Again, the statute cannot be relied on because in an action brought by the Bullion Company in 1865, it alleged the possession of the 420 Company, and that action remained pending until June, 1872, less than two years before the bringing of this action. That action was a continuing allegation or admission that the 420 Company was in possession up to the time the action was dismissed; and it can not now come in and against the same party stultify itself by alleging that the 420 Company has not been in possession within two

The 420 Mining Co. v. The Bullion Mining Co.

years. 2 Grant's Cases, 60; 1 Greenleaf on Ev. Sec. 27. Hence, so far as the defendant is concerned, the 420 Company was in possession up to June, 1872. But independent of this, to make a claim adverse so as to put the statute of limitations in motion, the possession must be open and notorious. There is no finding to that effect here.

L. Aldrich and C. E. De Long, also for Appellant.

D. Bixler, for Respondent.

I. This suit was based on sec. 256 of the Practice Act. To maintain it, it was necessary for the plaintiff to show that at the time of the commencement of the action it was in the actual possession of the claim in dispute. It failed completely to do so. There is not a scintilla of evidence in the entire record even tending to establish that fact; on the contrary, it clearly appears that at the time of the commencement of the action the defendant was in the exclusive adverse possession of the premises sued for, and had been in such possession for years prior thereto.

II. The complaint in the case of the Bullion Company v. 420 Company was in ejectment, and contained the ordinary allegations of title in the plaintiff, and ouster by the defendant. It was nothing more than a statement made on behalf of that company by the attorneys and the secretary, who verified it. It was not made by the corporation, and was in no sense a statement or declaration of that body, and consequently no clause in it can be held as an admission of the corporation. The statement then made was that the 420 Mining Company had in the year 1865 forcibly entered upon the ground now in dispute, and was at the time in possession of the same; nothing more. It was a declaration made on that day, and so far as being an admission, it ended at that time. Admit then that we are estopped from

The 420 Mining Co. v. The Bullion Mining Co.

denying the so-called admission, we lose nothing by it, for we are thereby only prevented from denying that the 420 Company was in possession on the day before mentioned.

III. It devolved upon plaintiff, under the statute of limitations, to show that it was seized or actually possessed of the mining ground sued for within two years next before the commencement of the action. *Gottschall v. Melsing*, 2 Nev. 185; *Chollar Co. v. Kennedy*, 3 Nev. 361. This it did not show. On the contrary, it appears that defendant had been in the actual, exclusive, and uninterrupted possession of the premises, claiming title thereto, and holding adversely to the plaintiff for more than seven years next before the commencement of the action. That constituted a complete bar to the action under the rules applicable to other real estate, which, by the terms of the law, are made applicable to mining claims. The claim that the finding was insufficient to justify the operation of the statute because it failed to assert the possession of the defendant as "open and notorious," is not justified by statute or decision. That is an element of evidence, but not a subject of finding. A finding is sufficient if it follow the language of the statute.

IV. If plaintiff ever had a cause of action, it accrued in 1865. We then forcibly ejected its agents and assumed exclusive possession of the premises. The plaintiff knew that fact. It could have then commenced its suit. The statute commenced to run in 1865, and there was no attempt to interrupt it for seven years. The fact that defendant commenced a suit in 1865 does not relieve plaintiff from the effect of the statute.

By the Court, HAWLEY, J.:

This action was commenced on the 29th day of November, 1872. It is alleged in the complaint that plaintiff is now, and it and its grantors have been since 1859, the own-

The 420 Mining Co. v. The Bullion Mining Co.

ers of, in the possession of, and entitled to the possession of certain mining ground, consisting of four hundred and twenty feet (described by metes and bounds); that the defendant claims an estate or interest therein, adverse to plaintiff, and that said claim is without any right; that on the 16th day of November, 1865, the Bullion Mining Company, defendant herein, commenced an action in the District Court of Storey County against the plaintiff to recover possession of said mining ground, "which said action was entitled 'Bullion Mining Co. plaintiff, v. Four Twenty Mining Co. defendant;'" "that on the 27th day of November, 1865, this plaintiff, then defendant, duly filed and served its answer to the complaint in said action, specifically denying every material allegation in said complaint; that thereafter and before the dismissal of said action as hereinafter set forth, said Bullion Mining Company filed its application with the register of the land office at the City of Carson, State of Nevada, for a patent from the government of the United States to certain mining ground, and included in said application the four hundred and twenty feet of mining ground hereinbefore described; that the Four Twenty Mining Company in due time filed its protest to said application for patent, setting up its adverse claim to the northern part or portion to the extent of four hundred and twenty feet of the mining ground embraced in said application, and, among other matters, set forth the pendency of said action, and thereupon all proceedings in said application for patent were stayed; that thereafter and on, to-wit: the 5th day of October, A. D. 1868, the said action was stricken from the calendar of said court and the papers therein sent to the clerk's office, subject to reinstatement, and that on, to-wit: the 3d day of June, A. D. 1872, on motion of counsel for plaintiff, said Bullion Mining Company, said action was placed on the calendar, and on motion of same counsel was dismissed, in the absence of, without the knowledge of, and without

The 420 Mining Co. v. The Bullion Mining Co.

notice to, the defendant, the Four Twenty Mining Company, or its counsel, of either or any of said motions; and that the said Four Twenty Mining Company or its counsel had no knowledge of the action of said plaintiff until after the filing of a certificate of dismissal of said action with the register of the land office aforesaid."

It is further alleged: "that the rights of the respective parties to the possession of the said mining ground and premises have never been judicially determined, or settled, or in any manner adjusted." The prayer is that the defendant may be required to set forth the nature of its claim; that it be decreed and adjudged "that the defendant has no estate or interest whatever in or to said mining ground, and that the title of plaintiff is good and valid; that the defendant be forever barred from asserting any claim whatever to said mining ground," etc.

The defendant, in its answer, denies the ownership and possession of plaintiff and avers "that at the commencement of this action, and for a long time prior thereto, it was, and still is, the owner of and in the possession of and entitled to the possession of said mining ground * * and every part thereof." And for further answer, pleads the statute of limitations.

The cause was tried before the court without a jury. From the findings of the court it appears "that sometime in the fall of 1859, a shaft was commenced on the northern end of the ground in dispute in this action by some persons claiming to represent a company called the 420 Company, and thereafter down to the early part of the year 1863, work was done in three different shafts on the ground in dispute, by persons claiming to work for a company called the 420 Company; that no further work for any company of that name is shown to have been done until sometime in the year 1865, when some persons commenced work in a shaft on said ground claiming to work for the 420 Company, and contin-

The 420 Mining Co. v. The Bullion Mining Co.

ued there for a short time until ejected by the employees of defendant, as hereinafter stated." (Finding 3.) "That the agents of defendant, in the year 1865, forcibly ejected from the mining ground in dispute in this action, the persons mentioned in finding 3 as working thereon for the 420 Company, and from that time until the commencement of this action and until this trial, the defendant has been in the actual, exclusive and uninterrupted occupation and possession of all of the mining ground in dispute in this action, * * claiming title thereto, and claiming the same adversely to this plaintiff." (Finding 9.) These findings are fully supported by the evidence. The commencement, pendency and dismissal of the suit entitled "Bullion Mining Co. v. Four Twenty Mining Co.," is set forth in the findings substantially as alleged in plaintiff's complaint. The complaint in that action was verified by George W. Hopkins, secretary of said Bullion Mining Company. It was alleged in said complaint that the Bullion Mining Company was the owner of, and entitled to the possession of, the mining ground in dispute in this action; that the Four Twenty Mining Company had wrongfully and unlawfully entered upon, taken possession of, and ousted the plaintiff from said mining ground, and was still in possession thereof, claiming adversely to the Bullion Mining Company and refuses to permit the Bullion Mining Company to possess, use or occupy said mining ground, or any part thereof, "in common with the defendant or otherwise."

1. To avoid the statute of limitations, it is claimed by appellant that this action is brought under an act of congress; and hence, that the limitations provided for by the statute of this State do not apply. The act of congress provides that where an adverse claim is filed within the time and in the manner specified in said act, certain proceedings "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the

The 420 Mining Co. v. The Bullion Mining Co.

adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be a waiver of his adverse claim." The act further provides that "after such judgment shall have been rendered, the party entitled to the possession of the claim * * may * * * file a certified copy of the judgment-roll with the register of the land office," and upon compliance with this and other provisions in said act, "a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." (U. S. Stats. 1872, 91, Sec. 7.)

Congress did not by the passage of this act, or by the acts passed July 26, 1866, and July 9, 1870, confer any additional jurisdiction upon the state courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the state courts of competent jurisdiction and institute such proceedings as they might under the different forms of action, therein allowed, elect; and there try "the rights of possession" to such claim and have the question determined. The acts of congress do not attempt to confer any jurisdiction, not already possessed by the state courts; nor to prescribe a different form of action. If the parties protesting are in possession of the ground in dispute, they can bring their action under sec. 256 of the Civil Practice Act (Stats. 1869, 239,) or, if they have been ousted from the possession, they could bring their action of ejectment; and in either action "the rights of possession" to such claim could be finally settled and determined. We are of opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in

The 420 Mining Co. v. The Bullion Mining Co.

our state courts, irrespective of the acts of congress. The fact, as found by the court, that the defendant had been in the actual, exclusive and uninterrupted occupation and possession of all the mining ground in dispute, claiming title thereto adversely to plaintiff for more than seven years prior to the commencement of this suit, constitutes a complete bar to this action. 1 Comp. Laws, 243, 244, Secs. 4, 5.

To have maintained any action in our State courts "to try the rights of possession" to a mining claim, the plaintiff must have shown that it, or those through or from whom it claims "were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action." 1 Comp. L. 1019, Sec. 4.

2. But it is argued by appellant's counsel that owing to the pendency of the suit of the "Bullion Mining Co. v. Four Twenty Mining Co.," until June, 1872, the defendant in this suit is concluded from asserting any rights or privileges under the statute of limitations. This position is sought to be maintained upon the theory that the defendant by allowing that suit to remain is estopped from proving, in this action, that the Four Twenty Mining Company was not in possession at the time of the dismissal of said suit, counsel claiming that as long as said suit remained pending in said court it amounted to a continuous allegation, from day to day, that the Four Twenty Mining Company was in possession; and that said suit not having been dismissed until the 3d day of June, 1872, the statute did not begin to run until that time.

We consider this position wholly unsupported by reason or authority. The general doctrine announced in the authorities cited by appellant to the effect that no man can take advantage of his own wrong and thereby sustain a defense of which in conscience he ought not to be permitted to avail

The 420 Mining Co. v. The Bullion Mining Co.

himself, has no application to this case. The averment in the complaint that on a certain day the Four Twenty Mining Company was in possession of certain mining ground was a mere statement or declaration, subject to amendment and susceptible of proof. But if treated as a *solemn admission* it would only amount to a continuous allegation that on the 16th day of November, 1865, the Four Twenty Mining Company was in possession of said ground—a fact which defendant in this suit does not attempt to deny. The fact then of the pendency of such a suit in no wise estops the plaintiff from pleading the statute of limitations. If the agents, servants and employees of plaintiff were forcibly ejected from the ground in dispute in 1865, it must have known the time when it occurred. It must also have known that defendant was in possession claiming the ground adversely to it, and it was not, by any act of this defendant, prevented from commencing an action to preserve its rights to said ground before the period prescribed by the statute of limitation had expired. It cannot plead ignorance of the law or the laches of defendant in not bringing the former case to trial or having it dismissed, as an excuse for not asserting its rights until the same were barred by the statute.

3. The findings of the court are sufficient to show that the possession of defendant was “open and notorious.” The objections urged by appellant upon this point are clearly untenable.

4. Appellant contends that the entry of defendant in 1865 should be construed simply as an assertion of the rights it claimed in the action of ejectment. The averments of the complaint in said action, although subject to criticism, will hardly justify the position upon which said claim is founded, to wit: that the defendant claimed merely a right of tenancy in common with the plaintiff. When the plaintiff was forcibly ousted the defendant claimed the whole of the

Street v. Lemon Mill and Mining Co.

ground in dispute, and has ever since had the actual and exclusive possession thereof, claiming the same adversely to the plaintiff. This fact entirely destroys the conclusion sought to be maintained by appellant.

The judgment of the district court is affirmed.

**WILLIAM R. STREET, RESPONDENT, v. LEMON MILL
AND MINING COMPANY, APPELLANT.**

NOTICE OF MOTION FOR NEW TRIAL, WITHOUT SPECIFYING GROUNDS, INSUFFICIENT.—A notice of motion for new trial, which fails to designate the grounds upon which the motion will be made, is insufficient.

DEFECTIVE NOTICE FOR NEW TRIAL NOT HELPED BY STATEMENT.—The language of section 197 of the Practice Act, requiring a notice of motion for new trial to "designate generally the grounds upon which the motion will be made," is clear, plain and explicit; and a disregard of it is not helped out by designating the grounds in the statement.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

This was an action to recover the possession of a certain mining claim, known as the "Hidden Jewel," in Eureka Mining District, Lander County. There was a verdict and judgment for plaintiff. Defendant moved for a new trial and gave notice of the motion as stated in the opinion. The motion being overruled, defendant appealed from the order and judgment.

A. M. Hillhouse, for Respondent.

Respondent objects to the consideration of any objections of appellant, because no notice of motion to move for new trial was ever given in the court below. That which purports to be such notice states no grounds upon which such

Street v. Lemon Mill and Mining Co.

motion will be based. It fails to comply with the requirements of the Practice Act in an important particular, and for that reason is radically defective, and respondent's motion to dismiss should have prevailed. *Worthing v. Cutts*, 8 Nev. 120; Practice Act, Sec. 197; *Sherwood v. Sissa*, 5 Nev. 349.

Thomas Wren, for Appellant.

I. Counsel for defendant gave notice that they would "move for a new trial upon statement hereafter to be filed." This was equivalent to notice that they would not make the motion upon either of the first, second, third or fourth subdivisions of section 195 of the Practice Act, but that the motion would be made upon one or all of the last three subdivisions. The notice was followed by the filing and service of a statement on motion for a new trial, stating the grounds generally, and also particularly. Is this not a substantial compliance with the statute? In the case of *Caldwell v. Greeley*, the court held that "courts should be liberal in allowing amendments to defective statements on motion for new trial," etc. 5 Nev. 258. Should courts not be equally liberal in the construction of statutes, in order that justice may be done, and parties not deprived of their property for the want of exact technical compliance with the statute?

By the Court, HAWLEY, J.:

This appeal is from an order of the court below refusing a new trial. Respondent objects to any consideration of appellant's statement and claims that no notice of intention to move for a new trial was ever given as by law required. The notice given by appellant reads as follows: "Take notice that said defendant hereby moves the said court to set aside the verdict and judgment rendered and entered in the above entitled cause and to grant a new trial of said cause; said motion is based upon a statement to be hereafter filed."

Street v. Lemon Mill and Mining Company.

The Practice Act provides, that the party intending to move for a new trial shall give notice of the same within a specified time, and that "the notice shall designate generally the grounds upon which the motion will be made." Stats. 1869, 226, Sec. 197. Does the notice given by appellant comply with this provision? We think not. The notice of intention to move for a new trial is independent of the affidavit and statement provided for in section 196. It must be based on one or more of the grounds mentioned in section 195; and the grounds relied upon must be generally stated in the notice. The language of the statute is clear, plain and explicit, and there is no excuse for such disregard of its express provisions.

In *Worthing v. Cutts*, this Court held that the Practice Act did not require that the statement should designate the general grounds of error relied upon, and added that "the notice of motion is required to state generally the grounds of error." 8 Nev. 120. In *Flateau v. Lubeck*, (24 Cal. 365) it was held that the use of the statement was "dependent on a valid and effectual notice." No statutory notice of intention to move for a new trial having been given, and the proper objections having been made by respondent, it follows that appellant's statement could not be made the foundation of a motion for a new trial. *Flateau v. Lubeck, supra*; *Zenith G. and S. M. Co. v. Irvine*, 32 Cal. 303; *Wright v. Snowball*, 45 Cal. 654; *Calderwood v. Brooks*, 28 Cal. 154.

The order denying a new trial is affirmed.

Wheeler v. The Floral Mill and Mining Co.

**FRANK WHEELER, *et al.*, APPELLANTS, v. THE FLO-
RAL MILL AND MINING COMPANY, RESPONDENT.**

SUBSCRIPTION AGREEMENT WHERE NO PAYEE NAMED—CONSTRUCTION. Where certain persons subscribed money towards building a quartz mill, in which all the subscribers were to be interested ; and the subscription paper, without naming any payee, provided that the money was to be paid in such manner and at such time as the majority of the subscribers might order : *Held*, that the subscription was for the mutual benefit of all the subscribers.

PLEADING A CONCLUSION OF LAW. An averment that certain parties became subscribers to the capital stock of a corporation by signing and delivering an agreement among themselves is not a statement of any fact, but of a mere conclusion of law.

RECOVERY OF SUBSCRIPTION—MUTUALITY BETWEEN PARTIES. Where it is attempted to recover subscriptions, it must appear that there is mutuality between the parties, and that the terms of the agreement have been complied with.

FACT NOT PROPERLY PLEADED NOT PROPERLY FOUND. Where in a suit to foreclose a mechanic's lien in which defendant claimed a set-off, the court found as a fact that the claim was "a proper matter of offset," but there were no proper averments in the answer upon which to base such finding : *Held*, that the fact was not properly found.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

This was an action commenced by Frank Wheeler and George W. Arnold, composing the firm of Frank Wheeler & Co., against the defendant, for the purpose of foreclosing a mechanic's lien for hardware, sold and delivered, amounting to seventeen hundred dollars and upwards. A number of other lien-holders intervened and set up their claims. The decree was in favor of the plaintiffs and intervenors foreclosing the respective liens; but in the case of the plaintiffs' claim there was a set-off of one thousand dollars allowed, reducing the judgment on their lien to \$766.30. Wheeler & Co. appealed from the judgment.

Wheeler v. The Floral Mill and Mining Co.

A. B. Hunt, for Appellants.

I. The averment that plaintiffs became subscribers to the capital stock, etc., is simply a conclusion of law and leaves defendant in the position that it must maintain its off-set on the naked agreement alone or fail.

II. The agreement referred to no corporation formed or about to be formed. Plaintiffs never agreed to take stock in the corporation of defendant or any other corporation. To hold that defendant could maintain an action on its answer for the recovery of the \$1,000, would be to make an entirely new and different contract for plaintiffs; not to enforce the one they made.

III. The agreement set forth in the answer is between the subscribers for their benefit and does not either hint or even suggest the existence or possible formation of any corporation, either foreign or domestic. If the agreement had been to take stock in any corporation, it could not be enforced by the corporation without tendering the stock.

Thornton & Kelley, for Respondent.

I. The averment in the answer, "that the plaintiffs became subscribers to the capital stock," etc., being a conclusion of law, is surplusage. The averment of the signing and execution of the instrument set forth, is a sufficient plea of the contract and places it before the court for construction.

II. The agreement was a contract between two or several persons for the benefit of another, upon which the third party may maintain an action, and that without assignment, transfer or formal act of ratification. *Carmegie v. Morrison*, 2 Met. 401; *Lawrence v. Fox*, 20 N. Y. 269; *Farley v. Cleave-land*, 4 Cow. 432; 9 Cow. 639; 2 Denio, 45; 4 Denio, 97;

Wheeler v. The Floral Mill and Mining Co.

1 Johns. 149; 17 Mass. 400; 7 Cush. 340; 10 Mass. 287; 1 Ventries 318; Comp. 443; 1 Boss. & Pull. 101 *in notis*; *Lully v. Hays*, 5 Adol. & Ellis, 548.

III. No question can be made as to the intent of the parties, apparent upon the face of the instrument. The enterprise was halting and motionless upon the road to completion and successful operation, for want of the necessary funds. Its need of money was urgent and immediate. A denial that the moneys subscribed were needful for instant expenditure for the completion of the mill would be frivolous and without foundation. Payment upon the order of a majority of the subscribers was an immediate duty, without which further progress in the common enterprise was impossible. The court below did not find the precise day upon which the majority of the subscribers fixed the time of payment. An implied finding will be presumed, that the resolution was passed at a time convenient and seasonable to effectuate the purposes of the movers of the undertaking. It is to be presumed that this Court will hesitate to assume a fact contrary to the implied declaration of the managers of the company.

By the Court, HAWLEY, J.:

Respondent is a corporation, and in this action claimed and obtained an offset of \$1,000 against the mechanic's lien sought to be foreclosed by appellants. The agreement under which the offset was claimed and allowed, reads as follows:

"Whereas it has been proposed to build a quartz mill at Pioche, Lincoln County, State of Nevada, (to be situated within the limits of said town of Pioche) the capacity of said mill being ten stamps with furnace, all complete in working order; and whereas, it is proposed to have the citizens of Pioche,

Wheeler v. The Floral¹ Mill and Mining Co.

whether in their capacity as miners, mechanics, or others, to hold an interest in the ownership of said mill, it has been decided to receive subscriptions for the carrying out of the enterprise, in such manner and method as a majority of the subscribers hereto may elect; and whereas the sum of fifty thousand dollars in gold coin will be the utmost limit of amount of money desired for the enterprise, we, the undersigned, do hereby agree and promise to pay the several sums set against our names towards the amount desired, and in such manner and at such times as the majority of the undersigned may order. Pioche, May 30, 1873.

FRANK WHEELER & Co., - - - - \$1,000."

This agreement was signed by sixteen others, and the subscriptions amounted in the aggregate to \$35,000. It was not signed by respondent. It is apparent upon the face of this agreement that the subscribers were to have an interest in the mill; it was to be of the capacity of ten stamps; was to be built within the limits of the town of Pioche, and was not to cost over \$50,000. The subscribers were to meet after the subscriptions were obtained and a majority were to elect the manner and method in which the proposed enterprise was to be carried out.

It will be observed that appellants did not undertake to pay "The Floral Mill and Mining Company," nor any particular person or corporation, the amount of their subscription. It was not a subscription for the benefit of another, but for the mutual benefit of all the subscribers. As a safeguard, it was provided that a majority of the subscribers should designate the manner, and direct the method, in which the enterprise was to be conducted. Whether they were to proceed by acts of incorporation, or otherwise, is not expressed in the agreement, and the respondent has failed to allege any fact connecting itself with the subscribers. The averment that appellants became subscribers

to the capital stock of respondent "by signing and delivering" said agreement, is not a statement of any fact, but a mere conclusion of law. The only other averment in the answer tending to connect respondent with the subscribers, to wit, that "the majority of the said persons, who signed said agreement, ordered that the several sums therein specified and set against the names of the said signers should be paid to the said company (respondent) on demand" is insufficient. The answer fails to state what interest, if any, the appellants were to have in the property. It does not give the capacity of the mill, nor state its cost; nor does it appear therefrom, that the majority of the subscribers ever decided the manner and method "for the carrying out of the enterprise." In fact, there are no averments in the answer sufficient to show any mutuality between appellants and respondent, or that the terms of the agreement have been complied with. Unless such facts are alleged and proved the respondent is not entitled to recover the amount of appellant's subscription. *Goff v. Winchester College*, 6 Bush. Ky. 444; *Machias Hotel Company v. Coyle*, 35 Maine 410; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 425; *Dalrymple v. Lanman*, 23 Md. 399; *Berry v. Yates*, 24 Barb. 202. The court found as a fact, that the offset pleaded by respondent was a "proper matter of offset;" but we cannot presume that this fact was properly found, because there were no averments in the answer to base such a finding upon. *Baron v. Frink*, 30 Cal. 489; *Burnett v. Stearns*, 33 Cal. 473.

The judgment, allowing the offset of \$1,000, is reversed and the cause remanded for a new trial.

Warren v. Quill.

W. P. WARREN *et al.*, RESPONDENTS, *v.* JOHN QUILL
et al., APPELLANTS.

FINDINGS, WHEN ATTACKABLE AS AGAINST EVIDENCE. A motion for new trial on the ground that the evidence is insufficient to justify the findings, based upon the alleged existence of a proven fact not noticed in the findings, cannot be sustained, unless it appear that the complaining party requested a finding upon the subject.

OMISSION IN FINDINGS OF FACTS OF DEFENSE. Where certain facts have been found which are warranted by the evidence, but there is an omission to find on an issue of fact essential to the determination of the rights of the losing party, such party should except to the findings as defective and point out the issue upon which he desires a finding; and if he fails to do so the judgment will not be reviewed.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action by W. P. Warren and Olive Warren against John Quill and Timothy Conley, to restrain the defendants from diverting the waters of a certain stream taking its rise in the foot hills and flowing over the lands of plaintiffs in Ormsby County. There were findings and decree in favor of plaintiffs. Defendants moved for a new trial, which was denied; and they then appealed from the judgment and order.

Ellis & King, for Appellants.

I. The stream in controversy has its source in a natural spring on the defendants' lands and flows thence to and upon the lands of plaintiffs. The only proof of any user or diversion of the water by the plaintiffs is their taking it after it reached their lands and using it for irrigation. The evidence also shows that the waters of the stream can be profitably used upon defendants' lands for irrigation; that their lands are such as to require irrigation, and that the waters

Warren v. Quill.

of the stream in controversy would be valuable to defendants for irrigation. The findings and conclusions of law, therefrom, are against the evidence, and the decree against the law.

II. The decree fails to respect defendants' right to use the stream for stock or domestic purposes—in fact, severs it from their land even while it is finding its course over it, and virtually gives the plaintiffs a right to the very corpus of it when so passing.

Robert M. Clarke, for Respondents.

I. The evidence supports the facts found; in other words, no fact found is contradicted by the proof. The most that can be said is that the court omitted to find these facts upon which defendants relied for their defense. But no application was made to have additional facts found; no suggestion was made that the findings were defective; nor were the findings excepted to in the court below. The defendants cannot now object for the first time that the findings were defective, or that there were no findings respecting their defense. Comp. Laws, Sec. 1669; *Morrill v. Chapman*, 34 Cal. 251; 25 Cal. 301. 29 Cal. 139; 41 Cal. 97; 35 Cal. 188; 36 Cal. 197; 45 Cal. 275; *Hixon v. Brodie*, 33 Cal. 237.

II. It is true, as stated by counsel, that where appropriation is not the rule, each riparian owner is entitled to a reasonable use of the water as it passes along. But it is equally true that no use is reasonable which works actual injury and substantial damage to a proprietor below. The reasonable use contemplated by the authorities is such as is consistent with the use by others having similar rights; and no use can be reasonable which destroys the rights of others or which wholly deprives others of the benefits of the stream. To hold it a reasonable use by appellants to turn the entire stream out upon their land, and thus deny plaintiffs any part

Warren v. Quill.

of the water for irrigation or for domestic purposes, would destroy the common right to the stream, and establish the doctrine that one owning or acquiring land at the source of a stream may take the water and use it and deprive others below of it, no matter what their rights or necessities may be.

III. There is nothing in the suggestion that the decree is too broad. It is like all decrees in similar cases, general in its terms, making no exceptions in favor of those natural rights—such as quenching thirst—which are excepted in the very nature of things, and with which courts cannot and do not attempt to deal.

Ellis & King, for Appellants, in reply:

The express findings do not support the judgment; or in other words, the judgment is not fully or sufficiently supported by the express findings. It can not be supported at all without a finding express or implied, that defendants' lands are not above those of plaintiffs' on the stream. Without such an implied finding (for confessedly it is not expressly found) the findings in the case do not raise any conclusion of law whatever.

By the Court, HAWLEY, J.:

This cause was tried before the court without a jury. The court found the following facts:

"1. The plaintiffs * * are and were at the time alleged in the complaint the owners of in fee simple and in the possession of the land and premises described in the complaint.

"2. The stream of water mentioned in the complaint flows in a natural channel over, through, and upon said land, and supplies the plaintiffs in part with water for stock and domestic purposes, and to irrigate said land and the crops grown thereon.

"3. The waters of said stream and all thereof are necessary for the irrigation of plaintiffs' said land and the crops grown thereon, and for their stock and domestic purposes.

"4. That in the year A. D. 1865, in the month of May, the plaintiffs' grantors appropriated all the waters of said stream for the irrigation of said land and for stock and domestic purposes, and ever since then, (except on the 12th day of August, A. D., 1871, when the same was diverted by the defendants) the plaintiffs and their grantors have used said water under claim of right, and adversely to all persons for the irrigation of said land, and for stock and domestic purposes during the irrigating season of each year.

"5. That on the 12th day of August, A. D. 1871, the defendants wrongfully and unlawfully diverted the water of said stream from the channel thereof, and deprived plaintiffs of the use thereof, to their injury and damage.

"As conclusions of law the court finds that plaintiffs are entitled to have and use the waters of said stream, and the whole thereof, for the irrigation of said land, and for stock and domestic purposes."

Defendants moved the court for a new trial, which was refused. Hence this appeal. The only objection urged by appellants is that the evidence adduced at the trial and embodied in the statement, "is insufficient to justify the findings, decision and judgment of the court, and that the same are against law." This objection is based upon an alleged fact which does not appear in the findings of the court, viz.: That the stream in controversy has its source in a natural spring on appellants' land, and flows thence to and upon the land of respondents. It is contended by respondents that, inasmuch as no application was made to have additional facts found, no suggestions that the findings were defective, no exceptions taken to the findings, and the evidence being sufficient to support the facts as found, the judgment should be affirmed.

Warren v. Quill.

The statute regulating appeals provides that "in cases tried by the court, without a jury, no judgment shall be reversed for want of a finding, or for a defective finding of the facts, unless exceptions be made in the court below to the finding or to the want of a finding; and in case of a defective finding, the particular defects shall be specifically and particularly designated; and upon failure of the court below to remedy the alleged error, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases." Comp. Laws, 1669.

In *McClusky v. Gerhauser*, appellant sought to reverse the judgment because the court below failed to find a certain fact. The record failed to show that the fact was called to the attention of the court below, "or that any exception was taken to that failure on the part of the court;" and it was held that "when an exception is not taken in such case, the judgment will not be revised." 2 Nev. 52.

The same statute came up for consideration in *Whitmore v. Shiverick*, wherein the Court said "it would have been more satisfactory if the findings had been more explicit as to the tenure" by which certain property was held; and, after citing portions of the statute, added, "in this case it seems to us, if the plaintiff thought this finding not sufficiently specific * * * he should have excepted to this finding, pointing out its particular defects. In the absence of such exceptions, we think it sufficient to support the judgment." 3 Nev. 312.

Again: In the *The State v. The Manhattan S. M. Co.*, where the Court held "that in some respects the court below was not sufficiently specific in its findings"—the Court said, "to make this objection available on appeal, application should have been made in the district court to correct or amend its findings. Nothing in the record appears showing that this was done. The point of objection cannot be raised for the first time in the appellate Court." 4 Nev. 336.

Warren v. Quill.

A similar statute, under various objections taken to appeals from judgments, and to statements on motion for new trial, has frequently been presented to the supreme court of California for interpretation, and it has universally been held that unless objections are made and exceptions taken to the findings, as specified in the statute, there is no necessity for a finding of all the facts in issue. *Warner v. Holman*, 24 Cal. 229; *Cook v. Pablo de la Guerra*, 24 Cal. 241; *Lyons v. Leimback*, 29 Cal. 140; *Lucas v. The City of San Francisco*, 28 Cal. 596; *James v. Williams*, 31 Cal. 212; *Merrill v. Chupman*, 34 Cal. 252; 35 Cal. 87; *Smith v. Cushing*, 41 Cal. 99; *Poppe v. Athearn*, 42 Cal. 617.

Each party is undoubtedly entitled to a finding upon every issue raised that is essential to the determination of his case, and the findings ought always to contain a concise statement of each specific essential fact established by the evidence; but this duty is not made obligatory upon the court unless the proper steps are taken by counsel. If the facts found by the court are contrary to, or unsupported by, the evidence, the remedy is by motion for new trial. *Green v. Clark*, 31 Cal. 593; *Rice v. Inskeep*, 34 Cal. 226; *Cowing v. Rogers*, 34 Cal. 652; *Prince v. Lynch*, 38 Cal. 531. But where, as in the present case, certain facts have been found by the court which are warranted by the evidence, and there is an omission to find on an issue of fact essential to the determination of the rights of the losing party, it is the duty of such party to except to the findings as defective and point out the issue upon which he desires a finding by the court. If he fails to do so, the judgment will not be reviewed by the appellate court.

In so far as the specifications of error permit an examination of the facts found, they warrant the conclusions reached. In making this statement, we must not be understood to intimate that a right to the use of water for agricultural purposes is to be maintained or protected under the act of

Warren v. Quill.

congress of July 26, 1866, unless it appears to have vested and accrued and to be recognized and acknowledged by the local customs, laws, and the decision of courts. Nor that a patent issued before the passage of the act of July 9, 1870, is subject to any such right. Upon these questions we express no opinion. Nor must the inference be drawn that in any case a riparian proprietor may take all the water of a stream for the purpose of irrigation, to the detriment of adjoining proprietors; for this is not the rule.

If it is a material fact whether or not "the stream of water described in the complaint takes its source from a spring situate and being on the land" owned by appellant Quill, as alleged in the answer, (a question of too much importance to be decided unless properly presented on its merits) appellants should have excepted to the findings and should have pointed out this particular defect, and requested a finding thereon. They had a remedy by following the provisions of the statute, and must abide the consequences which inevitably follow from such a departure from the settled rules of practice. After such a failure to comply with the provisions of the statute they should not be allowed the privilege they now ask, to build imaginary castles in the shape of implied findings and then bring in evidence to destroy this visionary superstructure.

The case of *Merrill v. Chapman*, *supra*, is in many respects similar to this. That was an action of ejectment, tried before the court without a jury. No fact was stated in the findings respecting the defendant's claim of title. Judgment was rendered for the plaintiff. The defendant moved for a new trial and under the general specification of error "that the evidence is insufficient to justify the findings and decision," pointed to facts that were not expressed in the findings. The facts recited in the written findings were sustained by the evidence, and it was held by the court, that

ould be useless for the defendant, in his motion for a
ial, to state as the grounds of his motion, that *such*
gs were contrary to the evidence; and under the opera-

* * the Practice Act he is driven to the necessity of
ng the implied findings." The court after stating that
endant might have excepted to the findings as defect-
requested the court for findings upon the facts upon
the defendant relied for title, said: "Had the request
ade for findings in respect to the facts, upon which
endant relies for title, doubtless the court would have
ed. That, most certainly, is the better practice in
s of ejectment, where the parties claim through differ-
ains of title. When title is found in one party, the
s not required to find the facts constituting the title
opposite party, for both cannot hold the same title;
s such a finding would greatly facilitate the decision of
se on appeal, it is not presumed that the court would
when requested."

Hidden v. Jordan, it was held that "if the judge * * *
to find upon any issue essential to the determination
case, the party desiring a finding may except * * *
defect. * * * When he excepts for defects, the 'par-
defects shall be specifically and particularly desig-
' that is to say, he must specify particularly the point
e upon which he requires the court to state the fact
" 28 Cal. 304.

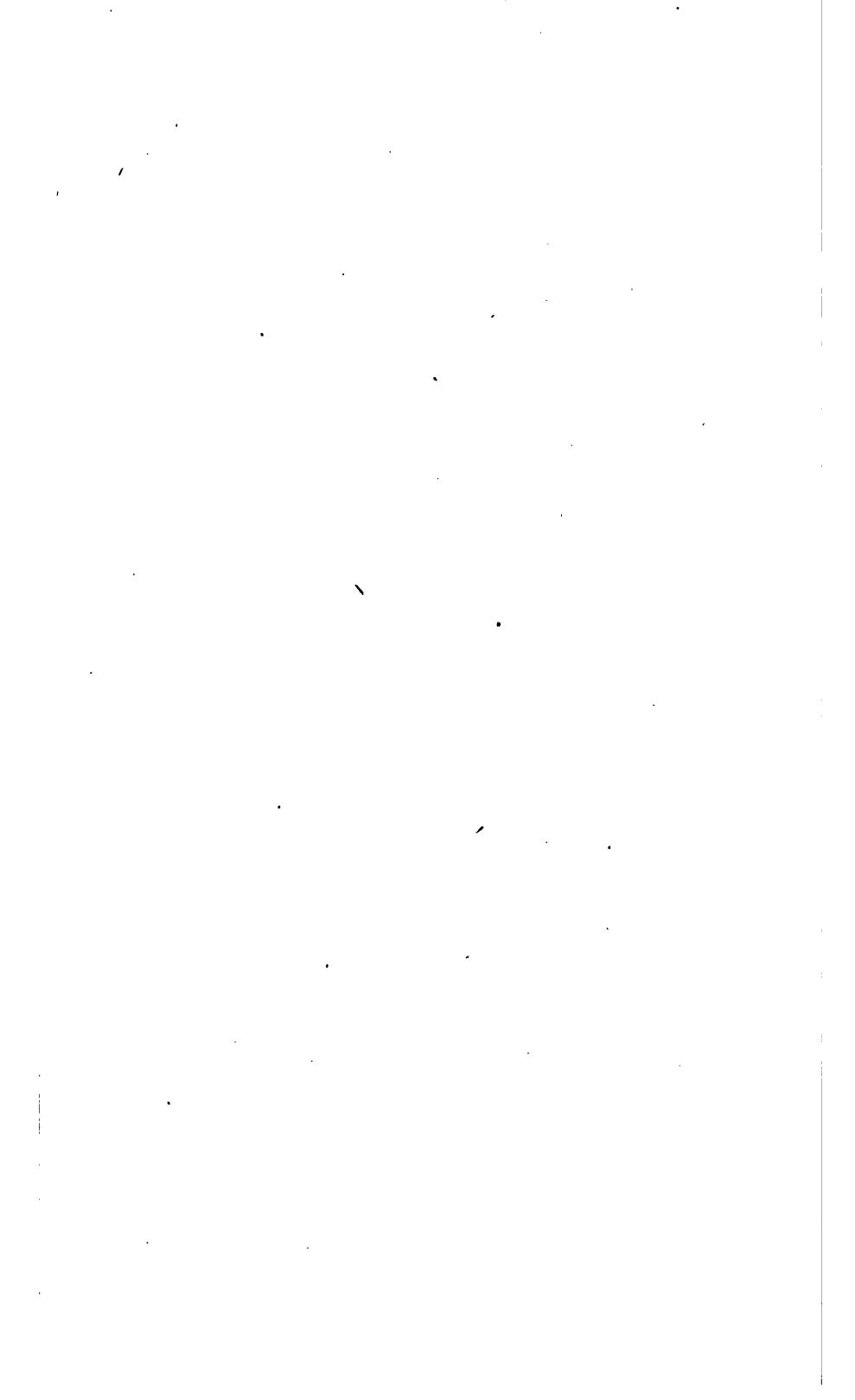
Hathaway v. Ryan, it was held that "if there be a
al fact in respect to which the findings are silent, this
oper ground of exception to them; and if the court
refuses to find as to that fact, it will be error on
." 35 Cal. 191.

have discussed some questions at greater length
was necessary for a decision in this particular case;
se, although the principles involved are well settled
merous decisions, there seems to be a disregard

Warren v. Quill.

of the provisions of the statute in relation to appeals, especially in cases tried before the court without a jury. It is to be hoped that the decisions this Court has recently been compelled to make upon preliminary objections, may have the salutary effect of remedying to some extent this erroneous practice. It is not our province to decide whether the statute is beneficial or wise. Our legitimate inquiry extends only to the question, whether or not its provisions have been substantially complied with. Where no constitutional objections appear, it is much better for counsel to adhere strictly to the letter of the statute and by so doing avoid, what is always, to us, an unpleasant duty—a decision upon points preliminary to a consideration of the merits of a case.

The judgment and order appealed from are affirmed.



REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.
JULY TERM, 1874.

THE STATE OF NEVADA, RESPONDENT, *v.* WILLIAM
SUMMERS, APPELLANT. [No. 1.]

FIXING TIME OF EXECUTION NOT PART OF JUDGMENT IN CAPITAL CASE. A judgment of conviction of murder in the first degree, which fixes a time for the execution of the sentence more than sixty days from its date, contrary to the statute, is not therefore void; for the reason that such fixing of time is not properly a part of the judgment and may be rejected as surplusage.

DEATH PENALTY—TIME OF EXECUTION FIXED BY WARRANT. Under the criminal law (Stats. 1861, 484, Sec. 454) it is the warrant and not the judgment, which fixes the time for executing the death sentence; and the court may at any time issue the warrant in due form of law.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The defendant was indicted for the murder of Frank Been, committed by shooting with a Derringer pistol at Douglas County on May 6, 1874. He was convicted of murder in the first degree on May 27. On May 30 judgment was entered and defendant sentenced to be hanged on July 31, 1874. He appealed from the judgment.

State v. Summers.

M. Tebbs, for Appellant.

I. The court below exceeded its jurisdiction in fixing a longer period than sixty days for execution of judgment. Comp. Laws, 525, Sec. 454; *State v. Lawry*, 4 Nev. 170.

II. The court, having fixed the time of execution by the judgment in term, has no authority over it after adjournment. *Suydam v. Pitcher*, 4 Cal. 280.

III. The warrant must recite the judgment and must conform to the same. The judgment being void the court has no power to issue a warrant for its execution. There being no legal judgment, the appellant is held without authority of law and is entitled to his discharge.

L. A. Buckner, Attorney General, for Respondent.

By the Court, WHITMAN, C. J.:

The only point in this appeal is that the judgment is void, because therein a date is fixed for the execution of a sentence of death, more than sixty days from the time of judgment, contrary to the criminal statute. It is needless to inquire what effect, if any, such a mistake would have upon a judgment which might properly include such an order; as by the statute of the State of Nevada it is the warrant and not the judgment which fixes the time for executing sentence of death. Stats. 1861, 484, Sec. 454. *People v. Bonilla*, 38 Cal. 699. So it follows that the language objected to in the judgment was mere surplusage, which may and should be disregarded, and that the court may at any time issue its warrant in due form of law. Stats. 1861, 485, Secs. 466-467. *People v. Bonilla*, 38 Cal. 699.

Let the judgment be modified by striking therefrom all matter relating to the time of execution; and let a remittitur issue immediately.

Longabaugh v. The Virginia City and Truckee R. R. Co.

SAMUEL LONGABAUGH, RESPONDENT, v. THE VIRGINIA CITY AND TRUCKEE RAILROAD COMPANY, APPELLANT.

FIRES CAUSED BY LOCOMOTIVES—RELEVANCY OF EVIDENCE OF PREVIOUS FIRES.

In a suit against a railroad company for damages occasioned by setting fire to cord-wood by one of its locomotives: *Held*, that testimony of previous fires in the same place caused by coals dropped from defendant's locomotives, and also of the emission at the same place of sparks of sufficient size to set fire to cord-wood, was admissible.

QUESTION OF NEGLIGENCE—RELEVANCY OF EVIDENCE OF SUBSEQUENT NEGLIGENCE.

In an action against a railroad company for negligently setting fire to cord-wood by coals dropped or sparks emitted from a locomotive, a witness was allowed to testify that a few weeks after the fire complained of another fire was caused on the same road by coals dropped from another engine of the same company: *Held*, competent evidence.

FIRE ALONG LINE OF RAILROAD—PRESUMPTIONS—BURDEN OF PROOF.

If one or more of the locomotives of a railroad company drop coals or emit sparks just prior to or soon after property on the line of its track has been destroyed by fire, without any other known cause or circumstance of suspicion, it becomes incumbent upon the company, in an action for damages caused by such fire, to show that their engines were not the cause of it.

IRRELEVANCY OF TESTIMONY ON ACCOUNT OF REMOTENESS.

In an action against a railroad for negligence in setting fire to cord-wood: *Held*, that the fact of a fire having occurred in the wood-yard previous to the building of the railroad was entirely irrelevant.

WHAT OBJECTIONS NOT AVAILABLE ON APPEAL IF NOT TAKEN BELOW.

Objections, not seasonably and clearly presented in the court below, are unavailable on appeal, if they are such as might by legal possibility have been obviated if so taken in the court below.

NEGLECT OF RAILROAD IN CAUSING FIRE IN WOOD-YARD, WHAT.

In an action against a railroad for setting fire by its locomotive to plaintiff's wood-yard, the court charged the jury that if they believed that a locomotive, if properly constructed and skillfully managed, would not set fire to wood piled on the side of the track; and if they further believed that the plaintiff's wood was destroyed by fire or sparks from defendant's engine, without plaintiff's fault, they should find for plaintiff: *Held*, no error.

RAILROAD BOUND TO USE BEST KNOWN APPLIANCES TO PREVENT INJURY.

A railroad company is obliged to employ the best known appliances to prevent injury to others from fire; and the failure to do so is want of ordinary care and prudence.

Longabaugh v. The Virginia City and Truckee R. R. Co.

"IMMEDIATE" AND "PROXIMATE" CAUSE THE SAME. In speaking of the contributory negligence of a plaintiff as a cause of damages, which will relieve a defendant from liability, the words "immediate cause" and "proximate cause" are indiscriminately used to express the same meaning.

USE OF DANGEROUS AGENTS—CARE IN PROPORTION TO DANGER. As a person employing a dangerous agent is obliged to use care in proportion to the danger of such agent, a railroad is required to use a greater amount of care where property near its track is from its nature more likely to be destroyed.

INSTRUCTION MUST BE APPLICABLE TO CASE. Where a jury had been fully charged and there was nothing in the instructions to indicate that a mere presumption, inference or guess would be sufficient to warrant the finding of a fact: *Held*, that it was no error to refuse an instruction to the effect that such a mere presumption, inference or guess would not be sufficient.

LIMIT TO RIGHT OF RAILROAD TO EMIT SPARKS. A railroad company has authority to run a locomotive propelled by steam and as a necessary consequence to emit sparks of fire; but it has no right to carelessly emit sparks in such a manner as to set fire to property along the line of its road.

WHAT CONTRIBUTORY NEGLIGENCE OF PLAINTIFF WILL RELIEVE DEFENDANT. The rule of law, which releases a defendant from responsibility for damages caused by his negligence when there is contributory negligence on the part of the plaintiff, is limited to cases where the act or omission of plaintiff was the *proximate* cause of the injury.

RIGHT TO USE DESTRUCTIVE AGENT TO BE "CAREFULLY LIMITED." Where, in an action against a railroad company for damages occasioned by setting fire to a wood-yard, the court instructed the jury that the exercise, employment and use by the railroad of the dangerous and destructive element of fire, to which it had a right, should be carefully limited with just regard to the rights of others: *Held*, no error.

RAILROAD SPARK-CATCHERS—HOW FAR NEW APPLIANCES NECESSARY. Though a railroad company must use the best appliances to prevent the scattering of fire, such appliances are not required to the extent of materially impairing the reasonable use of a locomotive engine.

RAILROAD TO KEEP ITS TRACK CLEAR AND PREVENT ESCAPE OF FIRE. A railroad company must be diligent in keeping its track clear of such combustible matter as is liable to be easily ignited, and especially diligent to prevent the escape of fire when in the immediate neighborhood of combustible property.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

Longabaugh v. The Virginia City and Truckee R. R. Co.

This was an action to recover damages for the destruction of certain cord-wood in the wood-yard of the Mexican Mill at Empire City. The amount claimed was \$5281, the value of wood burned belonging to plaintiff and his assignors. There was a verdict and judgment in favor of plaintiff for the amount claimed. Defendant moved for a new trial, which was denied; and he then appealed from the judgment and order.

Mesick, Seely & Wood, for Appellants.

I. The substance of the issue in this case was the careless and negligent conduct of the defendant's agents, servants and employees in the management and running of a locomotive, and in throwing fire therefrom; but the verdict was founded, if upon anything but prejudice, on the claimed failure of defendant to keep its locomotive in good order; and even that fact is only attempted to be shown by proof that at other times, other locomotives must have been out of order. From the allegations of the complaint, the defendant could not have been apprised of the character of the case, which on the trial, was made out against it. The complaint alleges acts of negligence in certain officers, performing a specified duty, and the only support by proof of this allegation was that other persons, on other occasions, had been guilty of the offense charged.

Witnesses were allowed to state that they had seen coals on the track, and that fires had been set, but were not confined to any particular period of time. Their observations extended over a period of nearly four years, and none of them was able to give any dates when such things happened. Under these circumstances the presumption held reasonable in the New York cases cannot be indulged, as it must be apparent that the defendant could not be able to produce every engineer that had taken a locomotive into the

Longabaugh v. The Virginia City and Truckee R. R. Co.

Mexican Mill wood-yard during four years, and by them disprove the testimony given by plaintiff's witnesses. Considering the uncertain character of the evidence, and its remoteness from the occurrence in question, it can be readily seen that, though it may have been utterly false and fabricated, yet the defendant was deprived of any possible chance to contradict it. It can scarcely be deemed within the range of probabilities, that the law will place a defendant in a position where he is cut off from all power to rebut testimony against him, which, if rendered certain, he would be able to disprove. Again, the reason of the rule in the New York cases wholly fails here. There the engines ran night and day, and with such speed, that no particular note could be taken of them; here it appears that but one engine was in the wood-yard on the day of the fire, and it remained there a quarter of an hour, and it is not shown that the name of that engine would have been difficult to get, or was even unknown to plaintiff. The charge was negligent and careless conduct on those in charge of defendant's locomotive; that being denied, the issue was whether such persons had been guilty of such negligent and careless conduct; but the evidence admitted, instead of corresponding with the allegation or being confined to the issue, merely went to show that at some six or seven times in four years one or more of the defendant's engines must have been imperfectly constructed or out of order. It is difficult to imagine a greater departure from the first rule of evidence than that exhibited by the record. Had counsel and court been desirous of upsetting every principle governing trials and of making a law unto themselves, they could scarcely have gone farther or succeeded better. See *Parker v. Rensselaer and S. R. R. Co.*, 16 Barbour, 315; *Mayor v. Humphries*, 1 Carr. & Payne, 25; *Breedlove v. Turner*, 9 Mart. Lou. Rep. 353; *Dunlap v. Monroe*, 7 Cranch, 242; *Malton v. Nesbitt*, 11 Eng. Com. Law, 318; *Gahagan v. Boston and Lowell R. R.*

Longabaugh v. The Virginia City and Truckee R. R. Co.

Co., 1 Allen, 187; *Robinson v. Fitchburg and Worcester R. R. Co.*, 7 Gray, 92; 7 Barbour, 18; *Green v. Palmer*, 15 Cal. 411; *Boyce v. Cal. Stage Co.*, 25 Cal. 469; *Egan v. Delaney*, 11 Cal. 85; *Wheeler v. Schad*, 7 Nevada, 211.

II. How counsel or court became possessed of the idea that proof of coals being seen on the track, subsequent to the fire which destroyed plaintiff's wood, was proper as tending either to establish the burning or the negligence, is a matter of deep conjecture. What possible figure such testimony could cut in the case, farther than to prejudice the minds and warp the judgments of the jury, is past finding out. If a man is negligent to-day, must he of necessity have been so yesterday? In any view, error in this particular seems palpable. In the case of *Field v. Central R. R. Co.*, 32 N. Y. 339, it is true that evidence was given of fires on the track both before and after the fire; but the objection was confined to the evidence of those occurring previously; and nowhere in that case was the question here raised, considered or decided.

III. The court below refused to allow us to show that fire had occurred in the wood-yard prior to the building of the railroad. This testimony, we admit, could only be relevant in view of the rule of probabilities upon which the case was tried. If the evidence adduced by plaintiff tended to fix defendant's liability, defendant had a right to prove that a fire happened in the same place before its time, and thereby meet probabilities with probabilities. Plaintiff having been allowed to show everything occurring from the building of the road to the day of the trial, the defendant ought to have been permitted to show everything occurring prior to the time when plaintiff's evidence began.

IV. The first instruction was erroneous. It left the jury to make but one inquiry, and that was as to the cause of the fire; and if they believed that the defendant's engine caused

Longabaugh v. The Virginia City and Truckee R. R. Co.

the fire, they are charged not to heed any defense nor any excuse defendant may urge. They are told that if they believe that a properly constructed engine, skillfully run and managed, will not set fire to inflammable material, but that one of defendant's engines did set fire to plaintiff's wood, they will find for plaintiff. They are not called upon to inquire whether or not defendant exercised any diligence or care in the construction of its engines, or in the running or management of them, or was guilty of any negligence in these particulars; they are not called upon to determine whether or not there was any inflammable material on the track, or if there was, whether or not defendant put it there, or even knew of its being there. No case yet decided has carried the doctrine of liability for fires to the extent fixed in the above instruction.

V. It was error to tell the jury that defendant was obliged to employ the best known appliances to prevent injury to others from fire. The utmost obligation upon defendant, was to use the best appliances usually employed upon railroads in this country. *F. & B. Turnpike Co. v. P. & T. R. R. Co.*, 54 Penn. State, 352.

VI. There was error in charging that the negligence of the plaintiff, in order to release defendant, must have been the *immediate cause* of the destruction of his wood. The utmost extent of the rule seems to be, that the plaintiff's negligence, to be considered contributory, need only be the proximate cause of the damage. *Shearman & Redfield on Neg.*, Secs. 33, 10.

VII. There was error in the instruction in reference to the permitting of bark or chips to accumulate on the track. Nothing of the kind was asserted or attempted to be shown. *Kesie v. Chicago & N. W. R. R. Co.*, 30 Iowa, 78; *The Ohio & Mis. R. Co. v. Shanefelt*, 47 Ill. 497; *Chicago & N. W. R. R. Co. v. Simonson*, 54 Ill. 504.

Longabaugh v. The Virginia City and Truckee R. R. Co.

VIII. It has been held that a railroad company is obliged to use additional care in towns and cities, and in passing through grain fields in a dry season, but it has never been held before that any greater precautions are demanded for the protection of cord-wood, than such as are ordinarily required toward any other property.

IX. In the absence of all proof as to the management or condition of the defendant's locomotive on the day of the fire, the only evidence upon which plaintiff could rely, was nothing more than a presumption, supported by proof that one engine had passed the place of the fire on the day it occurred. Such evidence, standing alone, was not sufficient to justify a verdict for plaintiff. The instruction that the jury was not to jump at a conclusion without proof, was therefore applicable and proper. *Smith v. Hannibal & St. Jo. R. R. Co.*, 37 Missouri, 295; *Shearman & Redfield on Negligence*, Sec. 333; 29 Barbour, 229.

X. There was error in refusing to give the instruction that an authority to run a locomotive propelled by steam is an authority to emit sparks therefrom. *Rood v. New York and Erie Railway*, 18 Barbour, 86; *Moshier v. The Utica and Schenectady Railroad Company*, 8 Barbour, 427; *F. and B. Turnpike Co. v. P. and T. R. R. Co.*, 54 Penn. State, 349; *Sheldon v. Hudson River R. R. Co.*, 14 New York, 224; *Shearman & Redfield on Neg.*, Sec. 332; *Fero v. Buffalo and State Line R. R. Co.*, 22 New York, 212.

XI. There was error in refusing the instruction asking the court to define not only the character of the appliances which defendant must use, but also the manner of their use. See *Smith v. Hannibal and St. Jo. R. R. Co.*, 37 Mo. 294; *Rood v. New York and Erie Railway*, 18 Barb. 87. Also, in refusing the instruction defining contributory negligence. See *Ohio and Mississippi R. R. Co. v. Shanefelt*, 47 Illinois, 501; 37 Mo. 294; 24 New York, 430; 20 Michigan, 253; 30

Longabaugh v. The Virginia City and Truckee R. R. Co.

Iowa, 78; 54 Illinois, 504. Also, in charging that the rights of defendant should be "carefully limited." This language was almost an invitation to the jury to find a verdict against the defendant. It said to them that, though the defendant had some rights, still their enjoyment was not as that of the rights of other persons, but was hedged about with any restrictions which it might please a jury to consider proper. The court had just told the jury, that although the defendant had a lawful right to use fire and steam, yet this right was an exceptional one among ordinary human pursuits. This was bad enough; but the last was the crowning glory. The defendant was no longer allowed to occupy the position given it by the law; but was reduced to the bare possession of an exceptional right, and that only to be held with a careful limitation. Had it pleased the court to say that defendant had no rights whatever, its error could have hardly been more egregious or more disastrous.

XII. There was error in charging substantially that a railroad company is only excused from employing such appliances as would prevent the working of the locomotive; also in charging that a railroad company must be diligent in keeping its track and right of way clear of such combustible matter as is liable to be easily ignited; also in charging that a railroad company must be especially diligent to prevent the escape of fire and sparks from its engines, when in the immediate neighborhood of combustible property. A railroad company is only required to use ordinary care and diligence. What is ordinary care may be determined by the circumstances, and in some cases greater care is required than in others, but nothing was shown in this case to warrant the use of the words "especially diligent."

XIII. The jury was substantially authorized to find negligence from the mere fact of the fire, when they were told that proof that defendant caused the fire might alone

Longabaugh v. The Virginia City and Truckee R. R. Co.

be sufficient to warrant them in coming to the conclusion that it occurred through defendant's negligence. But as a matter of law, no presumption of negligence arises from the fact of fire being communicated by a railroad engine. 1 Redfield on Railways, 452; *Field v. New York Central R. R. Co.*, 32 New York, 350; *Rood v. New York & Erie Railway*, 18 Barbour, 86; *Railroad Company v. Yeiser*, 8 Penn. State 377; *F. & B. Turnpike Co. v. P. & T. R. R. Co.*, 54 Penn. State 350; *Smith v. Hannibal & St. Jo. R. R. Co.*, 37 Mo. 295; 15 Conn. 124; 22 New York, 211; *Walsh v. Virginia & Truckee R. R.*, 8 Nevada, 115; 30 Iowa, 421; *Vaughn v. Taff Vale Railway Co.*; 5 Hurlstone & Norman, 678.

XIV. No effort was made to show that the offending locomotive had been handled in any manner in the least removed from the most cautious, skillful, and diligent; but on the contrary, it was shown that this locomotive was run and managed carefully and skillfully, and not overtasked; nor was any evidence given that any fire or sparks were thrown or dropped from either the smoke-stack or ash-pan of the locomotive on that occasion. Nor was there anything going to show that on that occasion that locomotive was not in perfect order and fully supplied with all necessary machinery and apparatus. There was no proof of negligence. The plaintiff piled his wood near the track in order to employ the railroad for its transportation; and if defendant did actually cause its destruction, it was the result of an accident, to prevent which defendant used every reasonable precaution, and against which plaintiff accepted the chances.

Lewis & Deal, for Respondent.

I. The allegation that defendant "so carelessly and negligently ran and managed its engines, that the said wood was fired," etc., is sufficient to admit proof of the running of defective engines. It cannot be said that the careless

Longabaugh v. The Virginia City and Truckee R. R. Co.

running of a locomotive simply means that there was carelessness in the means used for propelling the machine, or the management of it by the engineer. "Carelessly running" would as well include the use or employment of a locomotive not in good order. But there was no specific objection in the court below to proof on the part of the plaintiff that the defendant's engines were not in good order. The case was tried all through as if such proof were legitimate.

II. Proof of former fire was legitimate, even if there had been sufficient and specific objections taken to it. An examination of the cases will show that proof of former fires is not confined alone to the establishment of the fact that defective engines were employed. All the authorities, except the case from Maryland, hold that proof of former fires is proper for two purposes, namely, to establish at least a probability that the fire took from the engines, and second, to establish negligence. *Field v. The Central R. R.*, 32 N. Y. 339; *Sheldon v. The Hudson River R. R. Co.*, 4 Kernan, 218; *Shearman & R. on Negligence*, Sec. 333; *Fitch v. The Railroad*, 45 Mo. 322; 7 Kansas, 380; 1 Redfield on R. R. 453, and note; 2 Strob. 358; *Aldrich v. The Great Western R. R. Co.*, 42 Eng. Com. Law, 275; *Webb v. The Rome, Watertown and Ogdensburg R. R. Co.*, 49 N. Y. 420.

Such proof, in connection with the proof of the other two facts, namely: that an engine passed the spot where the fire started just before, and that there was no other probable way by which the fire could have taken, make out a clear and satisfactory case that the particular fire in question must have taken from the engine.

III. It cannot be said that the inference that the fire of the 26th of May was set by the engines of the defendant was weakened by the fact that we proved the continuous habit of setting fires from a remote period up to about that date;

Longabaugh v. The Virginia City and Truckee R. R. Co.

or rather, that such inference would be stronger, if we had only proven the setting of fires at times near the 26th of May. One would suppose that the longer a particular course of conduct is shown to have existed the stronger the inference that the same conduct or practice was pursued at any particular time.

IV. Proof of fires subsequent to the fire of May 26th was still proof tending to show that the fire of the 26th might have been set by the engines of the defendant—tending to show that an engine could set such fire. It makes no difference so far as the proof of such fact is concerned, whether the fires proven occurred before or after the fire of the 26th of May. It does not follow that because a “man is negligent to-day that he will be so to-morrow,” but it was a very rational inference that the fire of the 26th of May was set by the engines of the defendant, after we showed that its engines were in the habit of setting fires, under similar circumstances; and we proved that there was no other probable means by which it could have taken.

V. Proof that a fire had occurred in the wood-yard, years before the railroad was built, had no tendency to disprove either the fact that the fire of the 26th of May was not set by an engine, nor to negative the defendant's negligence. It was simply an offer to prove that a fire could take in a wood-yard, without the possibility of its being set by an engine. The proof had no bearing whatever in this case. It could not possibly tend to prove or disprove any material issue in the case; hence it was properly ruled out.

VI. The only objection that can be relied on to the first instruction is that it did not correctly state the law. That it did not state the character of inflammable matter intended, is rather too fine a discrimination to receive much consideration from practical minds. The instruction substantially was that if they found that an engine properly constructed

Longabaugh v. The Virginia City and Truckee R. R. Co.

and skillfully handled would not set such fire, and that the fire in question was set by the engines of defendant, then they should find for plaintiff, unless plaintiff was in fault. The question of negligence was fairly submitted; for if an engine properly constructed and managed would not set the fire, then the conclusion was irresistible that the company was negligent either in employing an incompetent person to manage its engines, or in running engines not properly constructed. The only proof in the case was that there was bark and chips on the track, that the fire took in such bark and chips, and it is only reasonable to think that the jury understood the court to charge them with reference to such combustible matter, and not as to something not mentioned in the case, such as gunpowder.

VII. The law requires a railroad company to employ the best known appliances to prevent the escape of fire or injury to others. "Ordinary care and prudence require the use of the best contrivances known, and unless such are used, it will be considered negligence." *Jackson v. The Chicago and Northwestern Railroad*, 31 Iowa, 176; *Fitch v. The Pacific R. R. Co.*, 45 Mo. 327; *Shearman & R. on Negligence*, Sec. 333.

VIII. The argument on the use of the word "immediate" instead of "proximate" is rather too transcendental to be grasped by our ordinary understanding. "Proximate" and "immediate" are generally defined by lexicographers to be synonymous, and so the courts, in defining contributory negligence, use the words indifferently, as meaning the same thing. 40 Cal. 14; 27 Conn. 406; 37 Cal. 406.

IX. The fifth instruction given, which had reference to chips and bark on the track, was more favorable to defendant than to plaintiff; but even if it had not been, it could at any rate not have injured defendant. As to the sixth instruction, it is in almost the exact language of the books that the care to be exercised by a railroad company must be propor-

Longabangh v. The Virginia City and Truckee R. R. Co.

tionate to the danger; that when the liability to set fire is great, the precaution should be greater than where there is no such liability. *Fero v. The Buffalo and State Line Railroad*, 22 N. Y. 209; *Gorman v. The Pacific R. R.*, 26 Mo. 441; 58 Ills. 389.

X. The instruction of defendant, which was refused, as to a mere presumption, inference or guess, was not proper, as it assumed that the evidence offered only amounted to a mere presumption, inference or guess; whereas the evidence was positive, though circumstantial in character, and tended to show that the fire was caused by appellant.

XI. That a railroad has a right to emit sparks, there is no question; but we claim that under the proof in this case, it had no right to emit such sparks as would do injury, and that was the only question in the case.

XII. Defendant's instruction as to contributory negligence was properly refused; because not correctly stating the law and also because there was no question of contributory negligence in the case; and further, because if there was, it had been correctly submitted in plaintiff's instructions.

XIII. The appliances generally used, even on defendant's road, do impair the use and diminish the power of their engines; such appliances always produce that result; and it is fair to say that if the power of an engine be perceptibly lessened it is *materially* impaired; for any lessening of the power is a material impairment of the usefulness of an engine. But the court here told the jury that such appliances are not required to the extent of impairing the reasonable use of an engine. Now, if there was any objection to this language, the plaintiff was the only person who could complain; for he alone could have been injured by it.

XIV. The charge that it was the duty of the railroad to be diligent in keeping its track clear of combustible matter

Longabaugh v. The Virginia City and Truckee R. R. Co.

liable to be easily ignited and to prevent the escape of fire at all times, much more so when in the neighborhood of combustible matter, was proper. 31 Iowa, 176.

XV. Courts, in determining whether a charge was correct or not should look to the entire charge and not to detached sentences. It is perfectly clear from the charge here, when taken as an entirety, that the jury could not possibly have come to the conclusion that they had a right to find against the defendant upon mere proof of the setting of the fire, unless that same proof also proved the negligence. The jury was over and over again told that the plaintiff was compelled to prove, not only that the defendant set the fire, but further, that it was set by means of the defendant's negligence. The language is really nothing but a quotation from the opinion of Judge Wright, in *Field v. The Central Railroad*, 32 N. Y. 346.

By the Court, HAWLEY, J.:

This action is brought by plaintiff to recover damages for the burning of certain cord-wood, on the 26th day of May, 1873. The complaint alleges: "That the defendant by its agents, servants and employees, not regarding its duty in that respect, so carelessly and negligently ran and managed its locomotives, that the said wood was fired and completely destroyed by fire carelessly and negligently dropped and thrown from said locomotives, by the said servants and employees of the said defendant." On the trial the court permitted witnesses to testify that previous to May 26, they had frequently seen fires in the same wood-yard, caused by coals dropped from defendant's engines, and also, at various times seen sparks from said engines at the same place of sufficient size to set fire to cord-wood. The defendant objected to the admissibility of this testimony on the ground

Longabaugh v. The Virginia City and Truckee R. R. Co.

that it "was irrelevant, incompetent, and as not tending to establish any issue in this case." This objection was general. If, therefore, the testimony tended to establish any of the issues raised by the pleadings, the objection was properly overruled.

1. Was this testimony competent, under the facts of this case, to prove any of the issues raised by the pleadings? This, in my judgment, is the most important question presented by this appeal. There is a conflict in the authorities bearing upon this point. In *Baltimore and S. R. R. Co. v. Woodruff*, the lower court admitted testimony showing that before the occurrence of the fire upon plaintiff's farm, fire had been communicated by defendant's engines to the property of other persons on defendant's road. The court of appeals held this to be error. After quoting from Greenleaf that collateral facts are calculated to introduce a wide scope of controversy, drawing off the mind of the jury from the point really in issue, 1 Green. on Ev., Sec. 52, the court say: "It is by no means a necessary consequence, that because the engine did set fire to the property of another, it also was the cause of burning that of the plaintiff. * * The evidence offered is no less objectionable in reference to the question of negligence, than to that of the firing itself. There is no time specified. We do not know whether it was one month or five years before the injury in dispute. And the instances alluded to might have occurred without the least negligence, which the defendant would have been able to show by satisfactory proof, if notified of an intention to introduce them. Or if they had been the result of great carelessness, nevertheless, the injury complained of in this suit might have occurred when the agents of the company were using all proper precaution." 4 Maryland, 254. It is claimed that this case is an authority directly in point. It is relied on by defendant's counsel, who urge substantially the same reasons against the admissibility of the testimony in this case.

Longabaugh v. The Virginia City and Truckee R. R. Co.

The court of appeals, in New York, has uniformly held such testimony to be admissible. In *Sheldon v. Hudson R. R. Co.*, Denio, J., after stating the facts, said: "I think, therefore, it is competent prima facie evidence, for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned. * * * The evidence * * not only rendered it probable that the fire was communicated from the furnace of one of the defendant's engines, but it raised an inference, of some weight, that there was something unsuitable and improper in the construction or management of the engine which caused the fire." 14 N. Y. 221. Hubbard, J., was of the opinion that the evidence "was competent, and should have been received upon the proposition whether the defendants caused the fire." After citing several English cases, claimed to be in point, he said: "The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be resorted to. * * The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague and unsatisfactory surmises on the part of the jury." 14 N. Y. 224.

In *Hinds v. Barton*, 29 N. Y. 544, although the testimony was not subject to some of the objections urged in *Sheldon v. Hudson R. R. Co.*, the court cited with approval the language of Denio and Hubbard, J. J., above quoted.

In *Field v. New York C. R. R.*, 32 N. Y. 339, the principles announced in *Sheldon v. The Hudson R. R. Co.* were again affirmed. Here the fire occurred in October, and the plaintiff was allowed to give evidence of another fire occurring on

his premises in May previous, and the court held that in the light of the decision in Sheldon's case and the peculiar circumstances of the case under consideration, the evidence was not too remote or indefinite to have any just influence upon the question of the cause of the fire and of negligence. It was not proved by what engine the fire was dropped, nor that any engine had dropped coals on the particular occasion; but the fire was traced back from the burning wood to the defendant's track, on which coals were found, and in the immediate vicinity of which the dry grass was burned off. Upon this state of facts, Davis, J., said: "As bearing upon the question how this fire came upon the track, it was competent to show that the locomotives of the defendant had been accustomed to scatter coals of fire frequently along the track." The same justice held that "it was also competent on the question of defendant's negligence."

In *Webb v. R. W. and O. R. R. Co.*, upon the trial, the court allowed evidence on behalf of plaintiff, under objection, that defendant's engine for a month or two before the fire had dropped quantities of live coals in the locality of the fire; that there were live coals upon the track at other places at the time of the fire; and that coal at other times had dropped from the engine in question, and the court of appeals held that such evidence was "pertinent and proper." 49 N. Y. 424.

It is undoubtedly true that the value of any given case as an authority depends very much upon the similarity of the facts with the case under consideration. Facts are the controlling elements in every case. I fail, however, to observe the force of the argument of defendant's counsel in their efforts to point out an essential difference between the facts of this case and the cases in New York. True, the engines of defendant in 14 and 32 N. Y. ran night and day, and with such speed, that no particular note could be taken of them as they passed. It was there impossible to designate the

Longabaugh v. The Virginia City and Truckee R. R. Co.

offending engine. Here there was but one locomotive, the "I. E. James," in the wood-yard on the day of the fire. In 14 N. Y. the testimony was confined to a time at or about the time of the fire. Here witnesses were allowed greater latitude. But are these distinctions important? Do they change the reasoning of the opinions we have quoted; or require a different rule in this, from other cases? What are the facts of this case? Plaintiff's wood caught fire in some manner to him, at the time, unknown. How did the fire originate? This was the first question to be established in the line of proof. Positive testimony could not be found. The plaintiff was compelled, from the necessities of the case, to rely upon circumstantial evidence. What does he do? He first shows, as in the New York cases, the improbabilities of the fire having originated in any other way except from coals dropping from defendant's engines. He then shows the presence, in the wood-yard, of one of the engines of the defendant within half an hour prior to the breaking out of the fire. Then proves that fires have been set in the same wood-yard within a *few weeks* prior to this time, from sparks emitted from defendant's locomotives. I think such testimony was clearly admissible, under the particular facts of this case, upon the weight of reason as well as of authorities.

The conclusions reached by the court of appeals in *Baltimore & S. R. R. Co.* are not consistent with the testimony in this case, and hence the value of its reasoning is materially shaken if not entirely destroyed. On the question as to the cause of the fire, the court in Maryland held that the very nature of an engine was sufficient to satisfy a jury that it would probably set fire to property along the road, and, that for this reason the testimony ought to have been confined to its manner of construction. Upon the question of negligence, the court said it could not be denied "that such an engine may communicate fire when running in the best con-

dition." Mechanical ingenuity is constantly employed in inventing new and improved machinery of every kind and character. It is fair to presume that decided improvements have been made in the appliances used on railroads to prevent the emission of sparks or dropping of coals from the engines since 1853, when the Maryland case was decided.

But we are not required to enter into any speculations upon this point. Holloday, a witness for plaintiff, who for thirty years had been engaged as a machinist and locomotive engineer, testified that an engine might be so constructed as not to throw out any fire. "It is done by putting screens in the smoke-stack and ash-pan. If an engine is supplied with the best known appliances in common use, and is skillfully managed, no sparks can escape from the smoke-stack or coals from the ash-pan that will set anything on fire." Substantially to the same effect is the testimony of defendant's witnesses. Bowker, master mechanic on defendant's road, and the inventor of the appliances used on the smoke-stacks of defendant's engines, a machinist and engineer of over thirty years practice, testified as follows: "If an engine is supplied with these appliances (his invention) and properly managed, it cannot throw sparks from the smoke-stack, or drop coals from the ash-pan that would kindle a fire."

It is not, says Greenleaf, necessary that the evidence "should bear *directly* upon the issue. It is admissible if it *tends* to prove the issue, or constitutes a link in the chain of proof; although, alone, it might not justify a verdict in accordance with it." 1 Green. on Ev., Sec. 51 a. The evidence was admissible, as tending to show a probable cause of the fire, and to prevent vague and unsatisfactory surmises on the part of the jury. Upon the question of negligence, it was admissible as tending to prove that if the engines were, as claimed by defendants, properly constructed and supplied with the best appliances in general use, they

Longabaugh v. The Virginia City and Truckee R. R. Co.

could not have been properly managed, else the fires would not have occurred. There is not in my judgment any substantial reason for the objection urged to this testimony on the ground that it referred to other engines than the one shown to be present on the day of the fire. The business of running the trains on a railroad supposes a unity of management and a general similarity in the fashion of the engines and the character of their operation. Nor is the objection that plaintiff was allowed too great a latitude in proving that fires had occurred at various times extending over a period of four years, well taken. The more remote in point of time the less relevancy it would have; and the more favorable it would be for defendant. But where, as in the present case, the proof shows such fires to have occurred within a *few weeks* prior to the time when plaintiff's wood was destroyed, and follows it up by showing that other fires have occurred at various times, at the same place, since the railroad was built, the more pertinent is the testimony. "The more frequent these occurrences, and the longer time they had been apparent," said Davis J., in *Field v. N. Y. and C. R. R.*, "the greater the negligence of the defendant; and such proof would disarm the defendant of the excuse that on the particular occasion the dropping of fire was an unavoidable accident."

2. Mrs. Weston, a witness for plaintiff, was permitted to testify, against the same objection of defendant, that she had seen a fire on the track about four weeks after the fire that had destroyed plaintiff's wood. This fire occurred from coals dropped from the locomotive "Reno." Under the reasoning of the authorities cited as applied to the facts of this case I think the testimony was admissible. Certainly such testimony would have been admissible if directed against the "I. E. James," the offending engine. But there is no pretense that the "I. E. James" is differently constructed from the "Reno" or any other locomotive on de-

defendant's road; or, that any different appliances are used to prevent the emission of sparks from the smoke-stack or the dropping of coals from the ash-pan. It was within the power of defendant, which must necessarily have intimate relations with all its engineers, conductors and employees, to prove these facts, if they existed. The *onus probandi* is upon the defendant. If one or more of its engines drops coals from its ash-pan or emits sparks and cinders from its smoke-stack just prior to or soon after property on the line of its track has been destroyed by fire without any known cause or circumstance of suspicion besides the engines, it becomes incumbent upon the railroad company to show that their engines were not the cause. The defendant in order to contravert such evidence should be able to show that the special facts at the time of the destruction of the property were such as to overcome the general inference from the plaintiff's evidence, and avoid the presumption which that evidence created. *Sheldon v. Hudson R. R. Co. supra*; *Field v. N. Y. & C. R. R. supra*. This the defendant attempted by showing that the "I. E. James" was a yard engine, used to run in and out of wood-yards, and for that reason "extra precautions were always used to have and keep the appliances for the arresting of sparks in good order and condition," &c., &c. This testimony was entitled to great weight and was doubtless properly considered by the jury.

3. It was not error for the court to refuse to allow defendant to show that fire had occurred in the Mexican Mill wood-yard, prior to the building of the railroad. This evidence was entirely too remote in its effect. It did not tend, either to rebut any evidence offered by plaintiff, nor to establish any fact in favor of defendant. This testimony was clearly inadmissible.

4. The first instruction, asked by plaintiff and given by the court, is as follows: "If you believe from the evidence

Longabaugh v. The Virginia City and Truckee R. R. Co.

that a locomotive engine, properly constructed and skillfully run and managed, will not set fire to cord-wood piled by the side of the railroad track, or to inflammable material that can, when set on fire, communicate fire to cord-wood; and if you further believe, from the evidence, that plaintiff's wood was destroyed by fire or sparks from defendant's engine or engines, without fault or negligence on the part of plaintiff, * * you will find a verdict for plaintiff." Three specific objections are urged by defendant's counsel to this instruction: First, That the construction of defendant's engines had nothing to do with the issues raised by the pleadings. No such specific objection was made at the trial to the admissibility of testimony bearing directly upon this point. The testimony of Holloday and Bidwell tended to show that the engines of defendant were not properly constructed, so as to prevent the emission of sparks or the dropping of coals. The defendant introduced testimony to prove that its locomotives were properly constructed. It met this issue and assisted in presenting it before the jury and tried the case, throughout, in the same manner as if such an allegation had been in the complaint. If the objection had been made at the proper time the plaintiff could, by leave of the court, have amended his complaint, or else have withdrawn this particular issue from the consideration of the jury. I understand the general rule of law to be that objections which by legal possibility might have been cured, or obviated, if they had been taken in the course of the proceedings under review, are unavailable in an appellate court unless they were reasonably and clearly presented in the court below. The second objection is not tenable. The words "inflammable material" must be held, upon the familiar rules of law, to apply to such material as was shown to be on or near the track. The third objection is also untenable. If the instruction legally bears the interpretation given it by defendant's counsel, "that the

Longabaugh v. The Virginia City and Truckee R. R. Co.

jury are told to find for the plaintiffs if they believe that the wood was fired by the defendant's engine," it would deprive defendant of one of its grounds of defense. But is the instruction susceptible of such construction? Certainly not. The jury must find, first, that an engine properly constructed and managed would not set such fire; second, that the fire was actually caused by the dropping of coals from defendant's engine. If these facts are found in the affirmative, would it not inevitably follow that the defendant was guilty of negligence? In the light of the testimony, the instruction was correct and pertinent to the facts of the case.

5. Defendant contends that it was error for the court to instruct the jury that defendant was obliged to employ "the best known appliances to prevent injury to others from fire." The rule is now well settled that railroad companies are liable, in cases of this character, for the want of ordinary care and prudence. The degree of care must always be measured by the facts and circumstances of each particular case. In cases like the present, ordinary care and prudence require the use of the best appliances known, and unless such are used it will be considered negligence. *Vaughan v. The Taff Vale R. Co.*, 5 H. and N. 679; *Fremantle v. The London and N. R. Co.*, 100 English C. L. 92; *Jackson v. The Chicago and N. W. R. R. Co.*, 31 Iowa, 177; *Fitch v. The Pacific R. Co.*, 45 Mo. 327; *Chicago and A. R. R. Co. v. Quaintance*, 58 Ills. 391. The court in Iowa, after stating the general rule, said: "One who fails to use the best means within his reach to prevent the destruction of property does not exercise the care of a man of common prudence." In Missouri the court say that "when as dangerous, as well as useful, an instrument of locomotion as a steam locomotive is used, its managers are bound to a care and precaution commensurate with the danger. They have a right to use the instrument, but have no right to scatter fire along their track; and when it is found that this is done, with no explanation of

Longabaugh v. The Virginia City and Truckee R. R. Co.

the cause, the jury is warranted in inferring that there has been some neglect. To rebut that reasonable inference, the defendant should show that the best machinery and contrivance were used to prevent such a result."

6. Defendant claims that in the third instruction asked by plaintiff, the court erred in charging the jury that the negligence of the plaintiff, in order to release the defendant, "must have been the *immediate* cause of the destruction of his wood, and herein argues, that the utmost extent of the rule is that, to be considered contributory, it need only be the *proximate* cause of the damage. Proximate cause is oftener used, and is probably better, yet it means that which immediately precedes and produces the effect as distinguished from remote. In examining the authorities it will be found that "immediate" and "proximate" are indiscriminately used to express the same meaning. *Isbell v. New York & N. H. R. R. Co.*, 27 Conn. 406; 37 Cal. 406; 45 Mo. 327.

7. In the fifth instruction the jury were told that if defendant "permitted bark and chips to accumulate on its track, and that through its negligence it set fire to such bark and chips, and that fire was carried or drawn from such fire by the wind to plaintiff's wood-pile, and plaintiff's wood thereby destroyed," the verdict should be for plaintiff. I cannot see how it was possible for the defendant to be prejudiced by the use of the language objected to. The jury could only have been misled by inferring from it that it must be found as a fact that the defendant permitted barks and chips thus to accumulate. This would be exacting more than the law requires, but would make the instruction more prejudicial to plaintiff than defendant.

8. The sixth instruction, objected to by defendant, that: "A person employing or using a dangerous agent is obliged to use care in proportion to the danger of such

Longabaugh v. The Virginia City and Truckee R. R. Co.

agent; he is also required to use a greater amount of care where property near its road from its nature is more likely to be destroyed," states a principle of law, applicable to this case, correctly. *Fero v. The Buffalo and S. L. R. Co.*, 22 N. Y. 211; *Gorman v. Pacific R. Co.*, 26 Mo. 447; *F. & B. Turnpike Co. v. P. & T. R. Co.*, 54 Penn. State 350; *C. & A. R. R. Co v. Quaintance*, *supra*.

9. It is claimed that the court erred in refusing this portion of the first instruction asked by defendant: "A mere presumption, inference, or guess, will not be sufficient to warrant you in finding the fact that the fire occurred from sparks dropped or thrown from the locomotive; nor will the fact that a locomotive at some time during the day and previous to the fire passed the place where the wood was piled, be alone sufficient to warrant you in coming to the conclusion that fire or sparks from the locomotive occasioned the damage." The testimony offered by the plaintiff was purely circumstantial. The various links connecting the chain of proof were to be closely scrutinized. The jury were to determine therefrom, whether or not such circumstances were convincing in their character; satisfactory in their proof; consistent with other facts, and reasonable with the conclusions reached. The evidence upon all points must be sufficient to satisfy the mind of the jury. A mere presumption that the fire originated from the engine of defendant, or that plaintiff's wood might have been so set on fire, would not of itself justify a verdict against the defendant. The fact that the wood was set on fire by sparks, or coals emitted or dropped from defendant's engines must, like other facts, be established by such competent evidence as would satisfy a reasonable mind of its existence. There should be no guess-work; no jumping at conclusions. *Fitch v. The Pacific R. R. Co.*, *supra*. The facts must be established, without the aid of sheer conjecture, or some presumption of

Longabaugh v. The Virginia City and Truckee R. R. Co.

law or fact, beyond what the facts proved rationally imported. *Smith v. Hannibal & St. Jo. R. R. Co.*, 37 Mo. 295. Plaintiff could not recover upon a possibility. The rights of property and all claims to its possession and enjoyment are dependent upon the existence of certain facts. When they are disputed and become the subjects of judicial investigation, if juries could assume their existence without sufficient evidence, and render verdicts upon possibility, probability and conjecture, the courts would be shorn of their legitimate authority and the wise and just rules of the common law, as they have been recognized and applied from time immemorial, would lose their principal value. This leads us to the examination of other questions. Did the court give the law correctly in other instructions? Could the jury in the light of all the instructions given, and in view of all the testimony submitted, have been misled upon this point? The case did not rest alone upon the fact that an engine had been in the wood-yard just previous to the fire. But the improbability of the fire having been set from any other cause was first established. But one house was situate near the wood-yard. The wind was blowing in such a direction as to carry sparks from this house away from instead of towards the wood pile. The fire occurred in the day time. It was discovered within half an hour after one of the engines had been in the wood-yard. It caught in the bark or chips that were on or near the track over which one of the engines of defendant had recently passed. The engines of defendant within a few weeks prior to and after the time of the fire had set fire in the same wood-yard. Coals of fire of sufficient size to set fire to cordwood had frequently been seen by several witnesses to drop from defendant's engines at or near the place where this particular fire occurred. The court, at defendant's request, instructed the jury that before a verdict could be found for plaintiff "two necessary facts must be established from the evidence to the satisfaction of

the jury: First, that the fire * * was in fact occasioned by fire dropped or thrown from a locomotive engine of the defendant; second, that such dropping or throwing of fire occurred through the careless and negligent conduct of defendant and its servants in the construction, repairs, management or running of the locomotive from which such fire was dropped or thrown." In its charge the court told the jury, that "negligence must be affirmatively shown by testimony in the same manner as any other fact is shown." It seems impossible that under this state of facts the jury could have inferred that "a mere presumption, inference or guess" was sufficient to warrant a finding that the fire was caused by sparks or coals from the engine; or that the mere fact of the presence of an engine in the wood-yard, near the time when the fire occurred, was sufficient to warrant any such conclusion. The withholding of this part of the instruction from the consideration of the jury was not, in my judgment, prejudicial to defendant.

10. It is argued by defendant's counsel that the court erred in not instructing the jury "that an authority to run a locomotive, propelled by steam, is an authority to emit sparks therefrom." The general proposition that defendant had the right to emit sparks is not denied. That follows necessarily from the authority to run the locomotive. *Rood v. New York & E. R. Co.*, 18 Barb. 87; *F. & B. Turnpike Co. v. P. & T. R. Co.*, *supra*. But it is claimed by respondent that the instruction should follow the testimony; that an engine supplied, as it was claimed the "I. E. James" was, with the best and most suitable appliances and skillfully managed, would not throw sparks from the smoke stack that would kindle a fire. That the leaving out this qualification was calculated to mislead the jury and justified the refusal of the entire instruction. So far as the remaining portions of the instruction have any bearings on the case, the prin-

Longabaugh v. The Virginia City and Truckee R. R. Co.

ciples therein enunciated were substantially given in other instructions. The defendant, under the law, has the right to use fire, to generate steam and emit sparks from its engines. But it has no right to carelessly emit sparks in such a manner as to set fire to property along the line of its road. If it does it is negligence, for which it is liable in damages to the person whose property is thus destroyed. The instruction without qualification, if not erroneous, was certainly calculated to mislead the jury to the prejudice of plaintiff, and was therefore properly refused.

11. The fourth instruction, asked by defendant and refused by the court, was substantially given in defendant's fifth instruction. The law in reference to the amount of care, skill, diligence and foresight, required of defendant, was correctly given to the jury.

12. The court did not err in refusing to instruct the jury that if plaintiff and his assignors by their *ordinary* negligence contributed to produce the injury, the plaintiff could not recover. The rule of law, in cases of this character, which releases the defendant from responsibility for damages on account of the negligence of the plaintiff, is limited to cases where the act or omission of the plaintiff was the *proximate* cause of the injury. *Flynn v. S. F. & S. J. R. Co.*, 40 Cal. 19; *Isbell v. N. Y. & N. H. R. R. Co.*, *supra*, and other authorities therein referred to.

13. Did the court err in charging the jury, of its own motion, that the rights of defendant should be carefully limited? "The ordinary occupation and business of a railroad company," said the court, "is in a word, lawful. In its ordinary business it may use the destructive element of fire and the prodigiously expansive power of steam and carry these agencies while in full operation anywhere, and along its line of track. Such rights are exceptional among ordinary human pursuits and business. Hence the necessity which arises that such employment and rights should be *carefully*

Longabaugh v. The Virginia City and Truckee R. R. Co.

limited, and operated constantly and diligently with just regard to the rights of others." The right of defendant to run and manage its engines is absolute; such rights are not exceptional among the ordinary human pursuits and business. In nearly every state, as in this, laws have been passed, authorizing railroad companies "to take, transport, carry and convey persons and property on their railroad, by the force and power of steam." In conducting such business the defendant was doing precisely what the law authorized it to do. The defendant, and all other persons or corporations engaged in said business, is entitled, the same as individuals engaged in the various other occupations, to have its rights protected. The maxim of the law, *sic utere tuo, ut alienum non laedas*, has as just an application to corporations created by legislative authority as to private persons in the use and control of their property. Therefore defendant's business should, as the instruction states, "be operated constantly and diligently with just regard to the rights of others." It is the manner in which the property of defendant is used that is to be limited, not the right to use it. The law in conferring the right to use an element of danger, protects the person using it, except for an abuse of his privilege. But in proportion to the danger to others will arise the degree of caution and care he must use who exercises the privilege. The greater the danger the higher the degree of vigilance demanded and the more efficient must be the means to secure safety. It is the duty of a railroad company using, as they do, such dangerous machines, and running in close proximity to the property of others, along its line of track, to use the utmost vigilance and foresight to avoid injury. If the locomotive symbolizes enterprise and attests the march of improvement and civilization, it by no means follows, that either the business or social interests of the country are advanced by refusing to limit its destructive tendencies, and to protect life and property

Longabaugh v. The Virginia City and Truckee R. R. Co.

against its misuse. It is the duty of those who use such hazardous agencies to control them carefully, to adopt every known safeguard, and to avail themselves from time to time of every improved invention to lessen their danger to others.

Could the language used by the court have been considered by the jury in the light which the learned and ingenious counsel for the defendant seek to place upon it? I think not. In the desire of exhibiting an originality of thought, and in the statement of abstract principles, we often find in the expression of courts, language that ought not to have been used without qualification; but which when carefully considered in connection with all of its surroundings convinces the mind that it could not have misled the jury or prejudiced the parties to the action. Is not this true of the language under review? Standing alone it is subject to the criticism of counsel. But when we examine it in the connection where it is used it becomes apparent that the jury understood from it that in the exercise, employment and use of this right which was dangerous in its character, and in this respect exceptional among human pursuits and business, the defendant was carefully limited by the law, "with just regard to the rights of others." This makes it consistent with the other portion of the court's charge and harmonizes it with the instructions asked by plaintiff.

14. The court after instructing the jury that railroad companies must use the best appliances to prevent the scattering of fire, said: "But it is to be observed, that such appliances are not required to the extent of materially impairing the reasonable use of a locomotive engine." This is claimed to be erroneous. In my opinion there is no substantial objection urged by counsel. Nor can any be given to the use of this language. The use of such appliances and the exercise of such care, as the law requires, does undoubtedly, to some extent impair the use of an engine.

Longabaugh v. The Virginia City and Truckee R. R. Co.

15. The court did not err in charging the jury that a railroad company "must be diligent in keeping its track and right of way clear of such combustible matter as is liable to be easily ignited." If it was, as claimed by defendant, foreign to the issues in this case, it could not have misled the jury; and if applicable, it stated the principle of law correctly.

16. It was not erroneous to instruct the jury that a railroad company "must be especially diligent to prevent the escape of fire and sparks from its engines, when in the immediate neighborhood of combustible property."

17. "But it not unfrequently occurs that the same testimony, which proves the injury, proves also the fact of negligence, without recurrence to further evidence in that particular in support of a recovery." It could not have been understood from the use of this language, as claimed by defendant's counsel, that proof that defendant caused the fire was sufficient to warrant the jury in coming to the conclusion that it did not occur in any way except through the defendant's negligence. The jury were repeatedly told that in addition to this fact, it must also appear from the evidence that the fire was caused by defendant's negligence. The case was tried upon this theory. The jury must have so understood it and could not possibly have been misled by this general observation, somewhat unhappily expressed. Wright, J., in *Field v. N. Y. C. R. R.*, states the rule correctly: "It often occurs, as in this case, that the same evidence which proves the injury shows such attending circumstances as to raise a presumption of the offending party's negligence, so as to cast on him the burden of disproving it."

18. The last objection, presented by defendant's counsel, is that the "evidence is insufficient to justify the verdict." With reference to the cause of the fire, I think, although the testimony is circumstantial, that it all tends to show that the fire must have been caused by the dropping of coals

Longabaugh v. The Virginia City and Truckee R. R. Co.

from defendant's engine. It is unnecessary to recapitulate the particular testimony upon which this belief is founded. The circumstances all point one way and seem to be inconsistent with any other reasonable conclusion. Not only the weight of the evidence, but all the evidence, tends to support the verdict upon this ground. Upon the question of negligence the defendant certainly made a very strong case. It offered testimony showing that the best appliances were used to prevent the emission of sparks or the dropping of coals. That not only ordinary care and prudence, but extra care and caution were used by all the servants and employees of defendant in running and managing its engines, especially in passing through this particular wood-yard. The "I. E. James," the offending engine, was shown to be in perfect condition on the day of the fire, and its engineers and fireman testified that on the particular occasion of the fire they exercised extra care and caution. In fact it would, perhaps, be difficult for a railroad company to offer any further proof upon these points. But the answer to the argument of counsel for defendant is found in the simple statement of the fact that there was some evidence, offered on the part of plaintiff, which tended to show that the engines of defendant were not equipped with the best appliances in general use. The fact that fire did escape from the engine tended strongly to support this evidence. It also tended to establish the fact that there was some negligence in the management of the engine.

Under the familiar rule of law, frequently recognized by this Court, there being a substantial conflict in the evidence, the verdict must stand. I have carefully considered each and every point made by appellant, and given the whole case that attention which its importance demanded, and have arrived at the conclusion that the case was fairly tried and decided upon its merits.

The order refusing a new trial is affirmed.



In the Matter of Mary Winkleman.

IN THE MATTER OF THE GUARDIANSHIP OF MARY WINKLEMAN, A MINOR.

IRREGULARITY IN APPOINTMENT OF GUARDIAN—WANT OF NOTICE TO FRIENDS.

The appointment of a stranger as guardian of the person and estate of an infant within three days after petition and without notice to the infant's relatives or the persons having its custody, is gravely irregular.

REFUSAL TO APPOINT GUARDIAN—PRESUMPTION IN ABSENCE OF EVIDENCE.

Where a transcript on appeal from an order refusing to appoint a person guardian on the ground of his unfitness failed to contain all the evidence: *Held*, that in the absence of the evidence, undisclosed testimony influencing the decision would be presumed.

APPEAL from the District Court of the Second Judicial District, Douglas County.

Mary Winkleman, a minor, was left an orphan of the age of two years, by the death of her father, Herman Winkleman, on February 5, 1874. Her mother had died shortly before. She was an only child and entitled to an estate, consisting of real and personal property in Douglas County, of the value of about fifteen thousand dollars. Two days after the father's death, J. R. Johnson of Genoa applied for letters of guardianship of the person and estate of the infant, setting forth that he had a friendly disposition towards the child and that she had no relatives by blood or otherwise in the United States, etc. Three days afterwards, in pursuance of his petition, letters of guardianship were issued to him; but there appears to have been no notice or citation of any kind or to anybody. On the same day Johnson qualified, giving a bond, as required by the order, in the sum of \$20,000.

On February 21, 1874, John C. Badenhoof presented to the district court a petition to have the letters of guardianship previously issued to Johnson set aside, and to be himself appointed guardian, setting forth his relationship to the minor, the letter to him left by her father, various

In the Matter of Mary Winkleman.

grounds why the appointment of Johnson should be vacated, etc. Johnson opposed Badenhoof's application; and the court made an order overruling the motion to vacate Johnson's appointment and refusing to appoint Badenhoof on the ground that he was not a proper person. The only reasons shown by the record why he was not a proper person were because he was "unmarried," "not of adequate property to answer for the minor's estate, though tendering sufficient bonds;" and, though "a person of unblemished moral character, honest, temperate, industrious and of sufficient capabilities to manage the estate," still "not a proper person to have the custody of said minor or the management of her estate." On the other hand the order showed that Johnson was a man of family and of sufficient property to answer for the estate so placed in his hands, and in other respects a very proper person to have the care and custody of the child.

From the order thus made Badenhoof appealed, and Johnson became respondent.

Robert M. Clarke, for Appellant.

I. The petition upon which Johnson was appointed did not state facts sufficient to give the court jurisdiction of either the person or estate of said minor. It did not show that said minor was an inhabitant or resident of the County of Douglas, or that she resided out of the State, but had an estate within the County of Douglas; nor did it show the existence of relations residing in the county, nor the name or names of person or persons having the custody of said minor. Comp. Laws, Sec. 833.

II. The order appointing Johnson was made without any notice to the relations residing in the county and without any notice to the person under whose care said minor was. When an application is made by a person not connected

In the Matter of Mary Winkleman.

with the minor by blood, notice to the relatives must be given; and for the same reason the custodian of the minor is entitled to notice also. 1 Hopkins, Ch. 226; 9 Paige, Ch. 202; 22 Barb. S. C. 187.

III. The dying wish of a parent should have a preponderating influence in the selection of a guardian. 9 Paige, 202; 2 Barb. Ch. 216; 3 Brad. 409; 1 Brad. 143.

G. P. Harding, for Respondent.

I. The court below did not err in overruling the motion to vacate the order. The law authorized the order upon the application of Johnson. Upon such application it was the duty of the judge to make due inquiry with a view to the discovery of relatives or persons in case of the minor. In the absence of any showing to the contrary this Court will not presume that "due inquiry" was not made; and in the absence of any law fixing or limiting the time of such inquiry the Court will not presume that such inquiry could not have been made before the order of appointment, simply because subsequent developments unearthed an immensely distant relative of the minor, and also a person with whom she was boarding.

II. Was Badenhoof injured by want of notice? He applied to be appointed guardian and as a preliminary moved to vacate Johnson's appointment. The court below denied his motion to vacate in form but ignored Johnson's appointment so far as to hear Badenhoof's application. By this action no impediment was interposed against Badenhoof. He was fully heard and the court below denied his application.

III. In view of the record this Court will not say that the court below abused its discretion in appointing Johnson, notwithstanding the letter of Winkleman, deceased, which

In the Matter of Mary Winkleman.

could only be considered if other things were equal. It will not be claimed that this Court can either appoint a guardian or direct the district court whom to appoint.

By the Court, WHITMAN, C. J.:

On the fifth of February, 1874, Winkleman died intestate. On the seventh of the same month respondent petitioned to be appointed guardian of Mary, the infant daughter of intestate. On the tenth of the same month his petition was granted without notice to the relatives of the deceased, or to the persons under whose care the infant was at the time of her father's death. From this order this appeal is taken, as may be done under section 299 of the "act to regulate the settlement of the estates of deceased persons." Comp. Laws, 192, Sec. 779. The action of the court in appointing respondent was at least gravely irregular, and must be reversed; and it is so ordered.

Appellant himself seeks the guardianship, showing as claim therefor that he is a distant relative of the infant, and the only one, save his brother, in the United States; a resident of the county where the infant and her property are; of good character; capable of managing the estate; presenting sufficient sureties; and backed by the following letter of absolute and touching confidence, penned by intestate on the day of his death:

"GENOA, February 5, 1874.

"A letter to Chris. Badenhoof.

"Dear Chris: In case that I should die, you shall become guardian for Mary. Do the best that you can. Sell everything and send it to the grand-parents, and see that the little one shall not afterwards remain in the country. You take her with you to Germany. She has money enough, if she only gets a good education. * * * * * The old Bowers

In the Matter of Mary Winkleman.

have not received anything yet. My things you and the old man can take. The papers are all in the trunk. I can't write any more. Do the best you can, with God's assistance, for little Mary.

“H. WINKLEMAN.

“* * * * * The papers are all in the trunk. * * * * * Most of the things are on the ranch yet, and the keys to them are here in the trunk. See to it that the keys go into no other hands but Badenhoof's; deliver to him the letter and the keys.” The portions omitted, though only touching minutiae of business, still bear out the perfect trust with which the intestate resigned all of earth to the care of appellant.

That in the face of the proven facts and this letter, in itself absolutely conclusive save under some extraordinary adverse showing, his petition was denied, would be a matter of surprise, were it not that the transcript does not purport to contain all the evidence. So when the district court, though presenting no basis therefor, finds, touching appellant, that he is “not a proper person to have the custody of said minor or the management of her estate;” it follows that this Court must presume that there was testimony undisclosed by the record, influencing the district court to its decision. Under such presumption it also follows that the order denying appellant's petition must be affirmed. It is so ordered, without prejudice however to a renewal of his application.

It is unnecessary to discuss the peculiar proceedings under which an attempt was made to ratify respondent's appointment; as the foregoing decision disposes of its subject matter; and in any view it was absolutely null.

State v. Rosemurgey.

STATE OF NEVADA, RESPONDENT, *v.* WILLIAM ROSE-
MURGEY, APPELLANT.

CRIMINAL LAW - AFFIDAVIT FOR CONTINUANCE. An affidavit for continuance in a criminal case on account of the absence of witnesses should give assurance of their attendance at the time to which it is proposed to continue, and show the means of affiant's information; and unless such attendance seems probable the continuance should be denied.

GRANTING OR REFUSING CONTINUANCE MATTER OF DISCRETION. The granting or refusing of a continuance in a criminal case rests in the sound discretion of the court, and its ruling will not be disturbed on appeal, unless an abuse of discretion is shown.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The defendant was indicted for the murder of Joseph Thomas, alleged to have been committed by shooting with a pistol in Lincoln County, on November 3, 1873. He was convicted of murder in the second degree, and sentenced to confinement at hard labor in the State prison for the term of fifteen years. He appealed from the judgment and an order overruling a motion for new trial.

When the case came on for trial in the court below, defendant presented an affidavit for continuance, the character of which is set forth in the opinion.

J. C. Foster, for Appellant.

I. The case was called for trial for the first time on April 13, 1874. In many of the states, when a capital case is called for trial for the first time, a continuance for one term is granted almost as a matter of course. 2 Graham & Waterman, N. T. 699. When a capital case is called for trial, and the defendant still finds himself unprepared, courts are extremely indulgent in granting adjournments even when it is simply expedient that a continuance should be had. *Turner*

State v. Rosemurgey.

v. *Morrison*, 11 Cal. 22; 3 *Graham & Waterman*, N. T. 894. See also *Choate v. Bullion M. Co.*, 1 Nev. 74.

II. The affidavit shows all the diligence that could be expected, and shows positively that the witness would be within the jurisdiction of the court at the next term. It would have been sufficient to show that there was some reasonable probability that this attendance could be procured at next term. *State v. Chapman*. 6 Nev. 320.

III. The threats stated in the affidavit were material and competent evidence under the testimony of both the prosecution and the defendant to explain the acts of the defendant. The threats were not only competent evidence but were absolutely necessary to explain the defendant's acts.

L. A. Buckner, Attorney General, for Respondent.

I. The ruling of the court on the motion for a continuance was not a ground of exception, but one of discretion. C. L., Sec. 2046. The affidavit showed no sufficient cause for a continuance. *Commonwealth v. Gross*, 1 Ash. (Pa.) 281.

II. The evidence stated in the affidavit was not material. There is no statement of facts in it to show that defendant acted in self-defense—in fact the affidavit does not state what the defendant, or deceased did in relation to self-defense. Threats cannot be material unless defendant can show that deceased assaulted him, and that as a last resort he was compelled to kill deceased to save his own life or prevent himself receiving great bodily harm. Sec. 27, Stats. 1861, p. 60; 2 *Bishop's Crim. Law*, Sec. 644—Note 4 and cases there cited.

III. The granting of a continuance in a criminal case is within the discretion of the court. *State v. Chapman*, 6 Nev. 320; *Griffin v. Polhemus*, 20 Cal. 180. It will not be granted on account of the absence of a witness, whose testi-

State v. Rosemurgey.

mony is not material. *Harper v. Lamping*, 33 Cal. 641. It will not be granted where it is not known where the witness is or when his attendance can be procured.

By the Court, BELKNAP, J.:

The only assignment of error in this case is upon the ruling of the district court denying defendant's motion for a continuance. The defendant was indicted upon the 13th day of February, 1874, for the crime of murder. Upon the 11th day of March he was arraigned, and the cause set for trial upon the 6th day of April, when it was continued until the 13th day of April. A further continuance was then moved upon defendant's affidavit. The affidavit alleges that subsequently to the commission of the offense and before any charge had been made against the defendant, one of his material witnesses, named James Bundy, left the State of Nevada for the avowed purpose of visiting his home in Great Britain. Before taking his departure he told defendant that he would return to the town of Pioche before the month of September, 1874, and that if his return should be delayed he would so write defendant immediately upon reaching Great Britain. The affidavit does not state whether defendant has received any letter from Bundy touching his return; *non constat* that he did not write that his return would be delayed. It does state that the defendant has been informed that Bundy arrived at his home in England and intended to return to Nevada in a short time. The means of this information should have been shown to the court, so that it could have considered the probability of the witness' return. The humanity of the law affords every reasonable opportunity to defendants in criminal cases to obtain their witnesses, but unless there is an assurance of their attendance at the time proposed for the adjournment or continuance it will not be allowed. In this case, the defendant's

State v. Rosemurgey.

version of the absent witness' statement reveals the uncertainty of his return.

Defendant avers that he caused letters to be written to Bundy after the cause was set for trial. In the most favorable view of this statement, twenty-six days intervened during which no effort was made to communicate with the absent witness. The object of these letters is not stated, but assuming that they were for the purpose of ascertaining when Bundy would return and to hasten his return, they fail to show due diligence. It appears that Bundy stated upon leaving Pioche that he would visit his home at Redrouk in Cornwall, England; that he has friends in Pioche whom he directed to send to his address the "Daily Pioche Record," so that he could be informed of the *status* of defendant's case, and also that he requested these friends to call from time to time upon defendant. It is declared that letters were written to the absent witness immediately after the finding of the indictment, for the purpose of obtaining his deposition. Thus it would seem that Bundy's address was known to defendant, and that it could be obtained from the persons in Pioche who were directed to call upon him; yet, as a reason why no deposition has been obtained, it is asserted that "this affiant has not attempted to get a deposition from said witness because of the uncertainty of the residence of said witness." A bare statement of the matter set forth in the affidavit exposes its inconsistencies and destroys its credence. The efforts, if any were made, to obtain the deposition of the witness, are immaterial, since the provisions of the Criminal Practice Act of this State do not embrace cases of this nature, in which the witness is out of the jurisdiction of the court (*State v. Chapman*, 6 Nev. 320,) but the excuse given betrays the desperation to which the defendant was driven to avoid his trial.

Granting or refusing a continuance rests in the sound discretion of the district court. It is fully informed of the

Bercich v. Marye.

circumstances of the case, and its ruling will be disturbed only when an abuse of discretion is shown. Its action in denying the continuance was correct; and it is ordered that the judgment and order appealed from be affirmed.

NICHOLAS BERCICH, RESPONDENT, v. GEORGE T. MARYE, APPELLANT.

LIABILITY OF BROKER TO TRUE OWNER FOR STOLEN STOCK SOLD. Where a broker received in the course of trade a transfer in blank of stock in a mining company, organized under the laws of California, which had in fact been stolen, and sold it: *Held*, that he was liable to the true owner for its value and damages.

STOCK IN CALIFORNIA MINING COMPANY, NOT NEGOTIABLE. Under the laws of California the legal title to mining stock, except as between the parties, can be acquired only by transfer upon the books of the corporation.

AGENCY NO DEFENSE TO ACTION OF TROVER. A person is guilty of conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner and is ignorant of such person's want of title.

MEASURE OF DAMAGES IN STATUTORY ACTION FOR CLAIM AND DELIVERY OF PERSONAL PROPERTY. The market value of stock at the date of conversion is the measure of damages in the action of trover; but in the statutory action of claim and delivery of personal property, in case a return cannot be had, the value of the stock at the day of trial, with the dividends that have been paid upon it as damages for detention, is the only complete indemnity.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action under the statute on claim and delivery of personal property, such as is usually known as an action of replevin. The plaintiff demanded the restitution of certain mining stock described in the opinion or its value and damages in the sum of seven hundred and seventy

Bercich v. Marye.

dollars in case a return could not be had. It appeared that the stock had been taken to defendant, who was a stock-broker in Virginia City, by a person giving his name as Bernarge. Defendant received and sold it, and, after deducting his commission and charges, paid over the balance of the proceeds to Bernarge. As a matter of fact the stock had been stolen from plaintiff, who, as soon as he found out his loss, published notice thereof. On November 8, 1873, when demand was made upon defendant by plaintiff for the stock, Belcher was worth \$77 50, and Caledonia \$7, per share. It also appeared that \$95 in dividends had been declared on the Belcher stock before the trial, and that \$70 of it had actually been paid. Plaintiff had judgment for the return of the stock, or, in case a return could not be had for \$724, as the value thereof, and interest from November 8, 1873, and costs; and for \$95 damages for detention, which latter sum was afterwards reduced by the court below to \$70. Defendant appealed from the judgment.

M. N. Stone, for Appellant.

I. The certificates of stock should be regarded as negotiable instruments. They were received in good faith from the apparent owner, to whom defendant paid the proceeds after he had sold the stock in the board of brokers. The *bona fide* holder of a lost or negotiable instrument acquires the title as against the true owner. 2 Parsons on Bills and Notes, 264, *et seq.*

II. Supposing that the stock was non-negotiable, yet the defendant here in his capacity of broker acted merely as the agent or bailee of the person who brought the stock to him to sell. There was no intention on his part to convert the stock to his own use, or to apply the proceeds to his own use. He cannot therefore be regarded as a purchaser converting the property. He had no notice of the claim made

Bercich v. Marye.

by plaintiff to the ownership until after he had sold the stock and paid over the proceeds. *Rogers v. Hine*, 2 Cal. 571; *Grumerey v. Fisher*, 1 Car. & Payne, 190; 44 Mo. 544; 41 Ala. 539.

III. There was error in assessing as damages the amount of dividends paid on the Belcher stock after plaintiff lost it. Defendant never at any time received any part of such dividend; and if he was liable in any event to plaintiff for the value of the stock, such liability could not embrace something he had never received. If defendant converted the stock, and we claim that he did not, the measure of damages would be the value of the stock at the time of its conversion, with legal interest as damages for the conversion. The conversion, if any, occurred when defendant received and sold the stock. The dividends were declared after the sale, and of course were received by whoever held the certificate at the time such dividends were paid by the company. *Boylan v. Huguet*, 8 Nev. 358.

Lewis & Deal and *J. A. Stephens*, for Respondent.

I. The statute fixes the rule for the measure of damages in cases of this character, and this Court has never sought to establish any other. *Blackie v. Cooney*, 8 Nev. 46. The case of *Boylan v. Huguet*, 8 Nev. 345, was an action in trover, and has no bearing upon this case. The damages allowed were the dividends which were actually paid on the Belcher stock between the time the stock was stolen and the time of the trial. It is true defendant did not receive the dividends; but that has nothing to do with the rights of plaintiff. He should not be placed in any worse position by the failure of defendant to deliver the stock than he would have been had the stock been delivered.

II. Defendant was not the innocent agent of Bernarge in receiving and selling the stock, but must be held to have

Bercich v. Marye.

received it with notice that it was the property of some one other than Bernarge. Although he did not intend to do wrong in receiving and selling it, his ignorance of the law will not free him from his legal liability. The corporations mentioned in the complaint were organized under the statute of California, and their stocks were not negotiable except in the manner pointed out in the law. See Hittell's Gen. Laws, 932. Defendant acted at his peril when he received them, and legally was as much liable for the stocks as Bernarge. If, for the convenience of his business, he took the chances, he cannot escape liability on account of his lack of prudence. Edwards on Bailments, 93; *Hoffman v. Carow*, 20 Wend. 22; *Weston v. Bear River and Auburn M. and M. Co.*, 5 Cal. 186; *Naylor v. Pacific Wharf Co.*, 20 Cal. 529. Plaintiff had the right to follow his property and take it wherever found, or in case it was sold, to hold any one responsible who sold it.

III. Defendant claims that he should be exempt from liability, because he was innocent of any intended wrong and because he had the right to suppose from the nature of the certificates that they were the property of Bernarge. But courts have not placed stocks on the footing of negotiable paper, even when no statutes are in force providing the mode of transfer; and it would certainly be an unheard-of thing to hold that certificates may be transferred like bills of exchange, when the statutes of California provide a mode of transfer which destroys all similarity between them and bills of exchange.

By the Court, BELENAP, J.:

Judgment in the alternative was rendered against the defendant for the restitution of five shares of the capital stock of the Belcher Silver Mining Company and twenty shares of the capital stock of the Caledonia Silver Mining Company,

Bercich v. Marye.

or the value thereof, and damages, under section 202 of the Practice Act. The shares were transferred in blank and were stolen from the plaintiff. The defendant is a broker, engaged in buying and selling mining stocks. He received the certificates stated in the usual course of his business from a stranger, sold them upon commission and paid him the proceeds. The first objection made by the appellant is that certificates of stock should be treated as negotiable instruments, and the defendant being a *bona fide* holder for a valuable consideration no recovery can be had against him.

By the statutes of California under which the Belcher and Caledonia Silver Mining Companies were incorporated, it is enacted: "The stock of the company shall be deemed personal estate, and shall be transferable in such manner as may be prescribed by the by-laws of the company; but no transfer shall be valid, except between the parties thereto, until the same shall have been so entered on the books of the company as to show the names of the parties, by and to whom transferred, the number and designation of the shares, and the date of the transfer. 1 Hittell's Gen. Laws, p. 148, Sec. 9. This restriction upon the transfer of stock determines the question of negotiability adversely to appellant. The legal title to the shares, except as between the parties, can be acquired only by transfer upon the books of the corporation. Any other form of assignment is merely equitable as against the corporation and is subject to its liens or claims. *Union Bank v. Laird*, 2 W. 390; *Shaw v. Spencer*, 100 Mass. 382; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599.

It is next objected that as the defendant was the innocent agent of the person from whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous. In applying this doctrine the

Little v. Virginia and Gold Hill Water Co.

supreme judicial court of Maine said: "If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title. *Kimball v. Billings*, 55 M. 147; *Koch v. Branch*, 44 Mo. 543; *Hoffman v. Carow*, 22 Wend. 285.

In ascertaining the measure of damages the court allowed the market value of the stock at the date of conversion. Such is the rule in trover; but this is a statutory action for the return of the property or its value in case a delivery cannot be had, and damages for the detention. Upon failure to return the property in specie the statute provides for the indemnification of the owner. The value of the stock at the day of trial, together with the dividends that have been paid upon it, as damages for the detention, is the only complete indemnity in such case. *O'Meara v. North American M. Co.*, 2 Nev. 112; *Boylan v. Huguet*, 8 Nev. 355, and cases there cited. For this the judgment must be reversed and a new trial granted.

It is so ordered.

WILLIAM M. LITTLE, APPELLANT, v. THE VIRGINIA
AND GOLD HILL WATER COMPANY, RESPONDENT.

CONSTRUCTION OF PLEADING — ALLEGATION OF PLACE OF CORPORATION. An allegation that defendant "is a corporation duly organized and doing business as such in the State of Nevada" is equivalent to an averment that such defendant is a corporation duly organized in the State of Nevada.

Little v. Virginia and Gold Hill Water Co.

PARTY TO ACTION CANNOT BE CHANGED BY AMENDMENT. An amendment which changes the parties to a suit cannot be made.

SUING THE WRONG CORPORATION—AMENDMENT NOT ALLOWED. Where a suit was intended to be commenced against, and the summons was served upon, a California corporation; but the complaint alleged a Nevada corporation; and there happened to be a Nevada corporation of the same name which appeared and answered: *Held*, that plaintiff had no right to amend by adding the words "of the state of California" to the name of defendant, as the effect would be to change the party defendant.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action to recover one thousand dollars damages for alleged interference with plaintiff's right to use the water of a small stream flowing out of "Rose Cañon" in Ormsby County. The complaint described the defendant as "The Virginia and Gold Hill Water Company, a corporation," and then proceeded to allege that it was "a corporation duly organized and doing business as such in the State of Nevada." The object of the pleader was to sue a California corporation of that name; and his intention doubtless was, not to allege where the corporation was organized, but merely to aver that it was a duly organized corporation and that it was doing business as a corporation in the State of Nevada. His language, however, as appears by the opinion, does not express his object or intention.

Although the California corporation was served, it did not appear; but the Nevada corporation of the same name appeared and put in an answer, describing itself as the defendant and traversing all the allegations of the complaint. The cause came up for trial before a jury. After the plaintiff's testimony was all in, he moved to amend the complaint by adding the words "of the state of California" to the name of defendant; but the amendment was refused; and on

Little v. Virginia and Gold Hill Water Co.

motion of defendant a non-suit was granted. Plaintiff moved for a new trial, which was denied; and he then appealed from the judgment.

Robert M. Clarke, for Appellant.

Mesick, Seely & Wood, for Respondent.

By the Court, HAWLEY, J.:

The complaint in this action alleges: "That the defendant is a corporation, duly organized, and doing business as such, in the State of Nevada." The sheriff of Storey County certifies that he served the summons "by delivering to the defendant, The Virginia and Gold Hill Water Company, a corporation, through its superintendent C. Overton, in the County of Storey, * * a copy of said summons attached to a certified copy of the complaint." A copy of summons, together with a certified copy of the complaint, was also deposited in the post office at Carson City, Nevada, postage paid, directed to Alvinza Hayward, president, and the trustees of the Virginia and Gold Hill Water Company, at their place of business in San Francisco, California. Defendant appeared and filed an answer verified by John Skae, who represented himself as the superintendent of defendant. During the progress of the trial of this cause it appeared from the testimony that there were two corporations of the name of "The Virginia and Gold Hill Water Company," doing business in the State of Nevada; one of said corporations, of which Alvinza Hayward was president and C. Overton superintendent, being organized under the laws of the state of California; the other, of which John Skae was superintendent, being organized under the laws of the State of Nevada. Upon this state of facts plaintiff asked leave of the court to amend his complaint by adding after the word

Little v. Virginia and Gold Hill Water Co.

"corporation," the words "of the state of California." This was refused, and upon motion of defendant's counsel the court granted a nonsuit. Plaintiff appeals and claims that this action of the court was erroneous.

The allegation that the defendant is a corporation, duly organized and doing business as such in the State of Nevada, is equivalent to an averment that defendant is a corporation, duly organized in the State of Nevada. This proposition is sustained by every canon of construction, legal and grammatical, and is, we think, too plain to leave any room for legitimate argument or controversy. Defendant would not be a corporation unless it had been duly organized as such. The averment that it was a corporation was sufficient. The place of its organization was immaterial. But plaintiff having designated the place, the question arises whether or not he is concluded by such an averment from so amending his complaint as to make the California corporation defendant. It is admitted that an amendment which changes the parties to a suit cannot be made.

Plaintiff's counsel contends that inasmuch as the summons was served upon the California corporation, plaintiff had the right, under the provisions of section 68 of the Practice Act, to so amend his complaint as to insert the true name of defendant. This would be true in a case of misnomer; but this is not such a case. Here there are two corporations of the same name—one organized in California, the other in the State of Nevada. The plaintiff has a cause of action against the California corporation, but none against the Nevada corporation. In his complaint he designates as defendant the Nevada corporation; and after this defendant had appeared and filed its answer, denying specifically each and every allegation in plaintiff's complaint, the trial proceeds, and during its progress plaintiff ascertains that he has brought the wrong corporation into court, and without any further showing, by affidavit or otherwise, moves to so

State v. Lambert.

amend his complaint as to designate as defendant the California corporation, against which he ought to have brought his suit in the first instance. Does not this fact show conclusively that the effect of allowing the amendment would be to change the party defendant in the suit? The service of the summons upon the corporation that ought to have been made defendant does not change the legal aspect of the question before the Court. The corporation served saw fit not to appear, because it was not named as a party defendant. The defendant need not have appeared because it was not served with process; but after the complaint was filed it had the right to appear in the action without the service of the summons, and having so appeared, and the court having thereby acquired jurisdiction, we are called upon, under the peculiar facts of this case, to decide the legal *status* of the parties thus in court. We cannot investigate the motives that prompted defendant's action, nor consider the hardship, if any, resulting to plaintiff therefrom. As the amendment would have substituted a new party defendant in the action, the court did not err in refusing it. The nonsuit was properly granted, because upon plaintiff's own showing he had no cause of action against the defendant.

The judgment of the district court is affirmed.

THE STATE OF NEVADA, RESPONDENT, v. GEORGE
LAMBERT, APPELLANT.

PENDENCY OF ANOTHER INDICTMENT NOT MATTER IN ABATEMENT. The pendency of another indictment has never been held to constitute matter in abatement.

DISTINCT LARCENIES AT SAME TIME AND PLACE. The stealing of the property of different persons at the same time and place and by the same act, may be prosecuted at the pleasure of the government as one offense or as several distinct offenses.

State v. Lambert.

FAILURE TO INDICT AT NEXT TERM. The object of the Criminal Practice Act in providing that a person held to answer shall be indicted at the next term of the court (Comp. Laws, Sec. 2206) is to protect the citizen from imprisonment upon insufficient cause; but such provision has no bearing upon the validity of an indictment found at a subsequent term.

CORROBORATING TESTIMONY, WHAT. Testimony tending to connect accused with the offense charged, such as proof of the possession of the subject of a larceny, is sufficient to corroborate the direct testimony of an accomplice.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The defendant was convicted of grand larceny and sentenced to imprisonment at hard labor in the State prison for the term of seven years. He appealed from the judgment and an order overruling his motion for new trial.

The indictment under which the conviction took place was found at the December term, 1873, of the district court, and charged the larceny on April 13th, 1873, in Lincoln County, of seven horses, the property of E. H. Pearson. It appears that at the previous March term of the district court an indictment had been found against him for the larceny at the same time and place of two horses, the property of R. O. Bridges. There was a trial under the first indictment in October, 1873; but the jury disagreed; and there was a similar disagreement at trials in November and January, 1874, after which the court ordered the defendant to be discharged from custody. Subsequently, but at the same term, the present indictment was found; and the trial and conviction took place in April, 1874.

J. C. Foster, for Appellant.

I. All the witnesses testified to facts which showed that the taking of all the animals was but one crime. If this was so, no second indictment could be found. The prosecution is not permitted to indict by piecemeal. It might as well

State v. Lambert.

be said that a defendant could be tried for petit larceny for each sheep when there had been a thousand taken at one time and place. The principle is the same as if two indictments were found for the same crime; if two, then why not a thousand? One can be done as well as the other.

II. No indictment could legally be found at the time the last indictment was found. Comp. Laws, Secs. 1851, 2206. The same evidence was before the grand jury at the March term as at the December term, when this indictment was presented; but the grand jury at the March term failed to find an indictment for these horses; and the case was not reserved for the further consideration of another grand jury. If no indictment at all had been found prior to the last one, none could have been found; the testimony having once been submitted. The grand jury had lost the legal power to indict.

III. There was no evidence to corroborate the testimony of Butler, and he was confessedly an accomplice. There was not a word corroborating his statement of the transaction; but on the contrary, he was contradicted by every witness for the defense.

L. A. Buckner, Attorney General, for Respondent.

By the Court, BELKNAP, J.:

The appellant was indicted at the December term, 1873, of the Seventh Judicial District Court, for the crime of grand larceny in stealing seven horses the property of one Pearson. At the trial the court refused to admit in evidence an indictment found against the appellant at the previous March term of the same court for the larceny of two other horses taken at the same time and place, the property of one Bridges. This is the first error assigned. A plea of former conviction or acquittal is a good plea in bar of another

State v. Lambert.

indictment for the same offense; but the pendency of another indictment has never been held to constitute matter in abatement. *Commonwealth v. Drew*, 3 Cush. 279; *Commonwealth v. Murphy*, 11 Cush. 472; *Commonwealth v. Berry*, 5 Gray, 92; *Dutton v. The State*, 5 Ind. 533. It is unnecessary to the determination of this appeal to decide whether a plea of *autrefois acquit* or *convict* would have been a good plea in bar to either indictment in case judgment had been rendered upon the other. It would seem that the stealing of the property of different persons at the same time and place and by the same act may be prosecuted at the pleasure of the government as one offense or as several distinct offenses. *Commonwealth v. Sullivan*, 104 Mass. 552; *State v. Thurston*, 2 McMullan, 382.

The second assignment of error is that, a term of court having intervened between the March and December terms, the time in which to bring an indictment for stealing the property of Pearson had expired under Section 2206. (Comp. Laws.) This section reads: "When a person has been held to answer for a public offense, if an indictment be not found against him at the next term of the court at which he is held to answer, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown." The record does not show that the defendant was within the provisions of the statute, but, if he were, this fact would have no bearing upon the indictment. The object of this section is the protection of the citizen from imprisonment upon insufficient cause. A dismissal of the indictment would not have barred another prosecution for the same offense. Sec. 2211 (Comp. L.)

Lastly, it is objected that the testimony of Butler, an accomplice, is not corroborated. His testimony is corroborated by Finley, who saw defendant at the "Fifteen-mile House," driving horses from the locality of the larceny at the time testified to by Butler. At Indian Springs, fifteen

State ex rel. Corey v. Curtis.

miles farther on the road, Parker saw defendant, and identifies some of the stolen horses at that time in his possession. St. Clair testifies that the defendant and Butler stopped in Cave Valley and sold some of the horses that were afterwards identified as stolen; and the arresting officer found the property at a ranch, known as that of the defendant. This testimony tends to connect the defendant with the offense, and this is all the statute requires. *State v. Chapman*, 6 Nev. 320; *People v. Melvane*, 39 Cal. 614.

The judgment and order refusing a new trial are affirmed.

THE STATE OF NEVADA *ex rel.* J. C. COREY *v.* SAMUEL T. CURTIS.

BY-LAWS OF MINING COMPANY—ADOPTION BY LONG USE. Where what purported to be the by-laws of a California mining corporation, though adopted by the stockholders instead of the trustees, appeared to be the only by-laws ever adopted by the corporation and were found properly recorded in the books kept by the trustees and had been used, acted upon and referred to as the by-laws, both by the trustees and stockholders, for upwards of ten years and ever since their adoption: *Held*, that they were to be considered and treated as the regular by-laws of the corporation.

ELECTION OF MINING COMPANY TRUSTEE A CORPORATE ACT. The election of a trustee of a mining corporation to fill a vacancy is a corporate act and must be exercised in the manner required by the charter.

CORPORATION CANNOT MAKE BY-LAWS CONTRARY TO CHARTER. Where the statute under which a corporation was organized required a majority of the trustees to do a corporate act and a by-law authorized a vacancy in the office of trustee to be filled by a less number than a majority: *Held*, that such by-law, being contrary to the charter, was void.

MINING COMPANY ELECTIONS—EXTENT OF REGULATION BY BY-LAWS. Under the California laws in reference to mining corporations, the *manner* of an election of a trustee may be regulated by the by-laws; but the *substance* must be in conformity with the statute.

State ex rel. Corey v. Curtis.

WHEN BY-LAW, PARTLY VOID, IS WHOLLY VOID. If part of a by-law is void and the whole forms an entirety, so that the part which is void influences the whole, the entire by-law is void.

WHEN STATUTE VOID IN PART AND VALID IN PART. The principle that an act may be void in part and valid in part applies only when the respective portions are wholly independent of each other. •

OFFICER "DE FACTO," WHAT. An officer *de facto* is one who has the reputation of being the officer he assumes to be, who has the apparent right and performs the duties of the office under claim and color of right and yet is not a good officer in point of law.

OBJECT OF SUSTAINING ACTS OF OFFICER "DE FACTO." The principle of sustaining the acts of an officer *de facto* is designed as a shield for the protection of the public and of third persons, who are not cognizant of the facts nor bound by any rule of law to inquire into the title by which he exercises the office.

LIMITATION OF PRINCIPLE SUSTAINING ACTS OF OFFICER "DE FACTO." The principle of sustaining the acts of a person acting as an officer as those of an officer *de facto* ought not to be extended to cases where the rights of the public are not affected nor where all the parties interested have knowledge that the person pretending to be an officer is not an officer *de jure*.

OFFICER "DE FACTO" AS DISTINGUISHED FROM USURPER. In order to make a person an officer *de facto* he should in some way have been put into the office and have secured such a holding thereof as to be considered in peaceable possession and actually exercising the functions of an officer; an intrusion by force is not sufficient.

This was an application to the Supreme Court for a writ of mandamus to remove the respondent from the office of superintendent of the Ophir Silver Mining Company. The petition of the relator set forth fully the facts upon which he relied. An alternative writ was issued, requiring the respondent to show cause why he should not be removed and surrender up the office of superintendent. On July 17, 1874, the return day of the writ, respondent appeared and filed an answer, alleging that the proceedings, claimed by the relator to constitute a removal of the respondent and an election of the relator, were void. The property of the Ophir Company, situated at Virginia City, being of great value,

State ex rel. Corey v. Curtis.

the controversy as to who was entitled to act as superintendent and have the management thereof became of great importance to the parties interested. The facts are stated in the opinion.

• *Hall McAllister*, for Relator.

I. The by-laws of the Ophir Silver Mining Company were properly made by the stockholders. 1 Hittell's Gen. Laws of Cal., 935, 936, 959. They were fully ratified and adopted by the board of trustees. *Union Bank of Maryland v. Ridgely*, 1 Harris & Gill, 325; *Langsdale v. Bouton*, 12 Ind. 467; *Angell & Ames Corp.*, Sec. 238, 284, 325; *Pixley v. West. P. R. R. Co.*, 33 Cal. 192. They were written in full on the first pages of the record book of the proceedings of the board of trustees. They were the only by-laws of the company, and had been substantially adopted both by stockholders and trustees.

II. The statute of California provides that "when any vacancy shall happen among the trustees by death, resignation or otherwise, it shall be filled for the remainder of the year in such manner as may be provided by the by-laws of the company." 1 Hittell, 936. The whole subject matter of filling a vacancy among the trustees is left completely to the by-laws. Under the power conferred by statute to fill vacancies among the trustees according to the by-laws, the company might by its by-laws have authorized the president alone to fill such vacancies. Instead of doing this, however, the by-laws provided that the president should have the casting vote at any meeting of the trustees at which a vacancy was to be filled. The giving of this casting vote conferred something new, something additional to what he before had as a trustee, and this something was a casting vote in case of a tie. It may seem peculiar that one person should have two votes upon the same question, but it is only in case of a

State ex rel. Corey v. Curtis.

particular exigency. Such a power ought to reside somewhere, to prevent a "dead lock." "A casting vote sometimes signifies the single vote of a person, who never votes but in the case of an equality; sometimes the double vote of a person, who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote." 1 Chitty's Blackstone, note 73; 5 Jacob's Law Dictionary, Parliament, sub. 7; 2 Dillon Municipal Corporations, Sec. 208; Cushing's Par. Law, Secs. 309, 317; Hittell's Gen. Laws, 1129, 1130; *McCullough v. Annapolis and Elkridge R.*, 4 Gill, 58. Unless the trustees can act under the by-law, providing for the filling of a vacancy in the board of trustees, there is no way in which such vacancy can be filled. And if the trustees act, in filling such vacancy, under the power given by the by-laws, the power must be taken as it is given—to wit, with right of the president to have his casting vote in case of a tie.

III. The filling a vacancy in the board of trustees is not a corporate act, it is an administrative or elective act. An election of trustees is the selection of those to whom are entrusted the corporate powers and by whom corporate acts can be performed. There are various acts in the administration of the affairs of a corporation, which are very essential to its proper administration and yet not corporate acts, such as the appointment of inspectors of corporate elections, (3 Serg. & Rawle, 29,) and the calling together of the trustees by the president, whenever he deems it necessary. But if the filling a vacancy were a corporate act it was performed in this case by a majority of a quorum of the board of trustees, by their adopting by-laws prescribing how such vacancy should be filled by the trustees, and by their giving a casting vote to the president at any meeting of the trustees for that purpose.

IV. While the statute asserts the general proposition that a decision of a majority of a quorum of the trustees shall

State ex rel. Corey v. Curtis.

be valid as a corporate act, it contains a special provision for filling a vacancy in the board of trustees as provided by the by-laws. This special provision has equal validity and equal force as the general provision. According to what rule of law, according to what canon of construction is it, that this court is asked to expunge this special and distinct provision from the statute book? There is no difficulty in allowing the general provision to operate, and also allowing the special provision to create an exception thereto, and to apply and control in the particular category which the statute intended it should provide for.

V. A majority of the trustees of the Ophir Company on June 29, 1874, displaced Mr. Curtis as superintendent and elected Mr. Corey to his position. If this was not a *de jure* board of trustees, it was at least a good *de facto* board of trustees. Who is an officer *de facto*? One whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid. See *Trustees of Vernon v. Hill*, 6 Cowen, 27; *Smith v. Erb*, 4 Gill, 460; *People v. Matlice*, 2 Abbott N. S. 290; *Ohio and Mississippi R. R. Co. v. McPherson*, 3 Missouri R. 25; *Angell & Ames Corp., Secs. 139, 257*; *Mickle v. Rochester City Bank*, 11 Paige, 124; *Doremus v. Dutch Church*, 2 C. E. Green, N. J. 332; 11 Serg. & Rawle, 413; 21 Penn. State, 146; 50 Missouri, 595; 2 Gill, 287; *Mullett v. Uncle Sam Co.*, 1 Nev. 188; *Brown v. Lunt*, 37 Main, 423; *Brown v. O'Connell*, 36 Conn. 432. For a very able and very exhaustive review of the whole doctrine as to *de facto* officers, see 12 American Law Register, March, 1873, 165.

VI. There is independent evidence of Lyle being a *de facto* trustee. The minutes of the board of June 29, 1874, show that other business was done besides the displacement of Curtis and the appointment of Corey. The minutes of the

State ex rel. Corey v. Curtis.

next meeting in July show that Lyle acted. He acted at other meetings.

VII. As to what constitutes a *user* of an office, see *The King v. Tate*, 4 East. 337, condensed edition, 452. An irregular election is voidable, not void. Abbott's Digest, Law of Corporations, 310.

VIII. The title of the trustees by whom relator was elected superintendent cannot be inquired of collaterally in this action. It can only be attacked directly in an action for that purpose. *People v. Sturns*, 5 Hill, 627; *King v. Hughes*, 4 Barn. & Cress. 368; *Douglas v. Wickwire*, 19 Conn. 488; *Cochran v. McCleary*, 22 Iowa, 76; *Facey v. Fuller*, 13 Mich. 531.

Garber & Thornton and Mesick, Seely & Wood, for Respondent.

I. Defendant was regularly elected by the board of trustees to his position of superintendent on March 22, 1874, and has been ever since in that position, claiming under such election. Whether his right to the place has ceased and relator's commenced depends upon the question whether the vote cast by Lyle at a meeting of the board of trustees was valid or invalid. We claim that Lyle was not a trustee and for that reason could not vote for the election or removal of a superintendent. He was not elected by the stockholders; and the trustees had no authority to elect him. The by-laws could not confer on the trustees the power of election, that power being by the charter given to the stockholders. 7 Cal. 24. The provision in the charter authorizing vacancies in the board to be filled in the manner prescribed in the by-laws cannot justify a departure from the charter in respect to who should elect. The word "manner" in this connection should receive the same interpretation as

when used in connection with the annual election of trustees. 2 Stewart (Ala.), 234; 10 N. J. Eq. 70.

II. But there were no valid by-laws on the subject of filling vacancies. The by-laws which existed were not made by the trustees, but by the stockholders, and so without authority. The pretended by-law under which the election of Lyle is claimed was never even acted upon by the board except in the case of Lyle. 11 Am. Rep. 268. But even if the trustees had power to fill a vacancy, they never did it. The vote to fill the vacancy was a tie unless trustee Lissak had two votes. But as trustee he had only one vote; his vote a second time as president cannot be considered as the vote of a trustee. A casting vote, when allowed, cannot be exercised in cases of electing officers. The pretended by-law under which a casting vote is claimed was never adopted by the board of trustees, and was never acted upon before; and hence was invalid.

III. The public policy of the rule which gives validity to the acts of officers *de facto* in certain cases does not apply to the acts of Lyle in question. He had never exercised any authority in the board prior to the act in question. He was forced upon the board by the illegal act of the president in an effort by the minority against the will of the majority to deprive defendant of his position and give it to relator. 39 N. H. 301; 3 Blackf. 377; 7 N. H. 547. Lyle, in point of fact, was not elected, and herein lies the distinction between this case and those cases where there has been an election or appointment. *King v. Ginsor*, 6 Term, 732; 19 Cal. 529; *Gashwiler v. Willis*, 33 Cal. 19; *Angell & A. Corp.* Sec. 744; 2 Stuart, 242; 29 Barb. 208; 2 Levins, 294; Sayer, 213; 2 Vent. 182; 6 East. 356; 11 Cal. 380; 2 Stockton, 70; Andrews, 163; 47 Pa. 292; 3 Whart. 228; 16 Cal. 618; 39 N. H. 295; 2 Strange, 1003, 1157; 34 N. H. 154. No act done by Lyle after the attempted removal of Curtis is even

State ex rel. Corey v. Curtis.

evidence to show that he was *de facto* trustee when the attempt was made. 60 Barb. 249.

IV. The power to elect or appoint officers is a corporate incident. Filling vacancies, like making by-laws, is also clearly a corporate act. A. & A. on Corp. Sec. 144; *Kearney v. Andrews*, 2 Stock. Ch. 70. Being a corporate act, it must of necessity be done either by the stockholders or the trustees, and certainly by the stockholders, unless the charter expressly gives the power to do it to the trustees. The language of the statute that vacancies shall be filled in the manner directed by the by-laws, does not differ from the case presented by *Kearney v. Andrews*, 2 Stock. Ch. 70. See sec. 6 of the charter, Hittell's Gen. Laws, 936, 941. But if the board had the power to fill the vacancy, the result would be the same; for the majority must have acted as decided in *Gashwiler v. Willis*, 33 Cal. 19, and the by-law is void according to all the authorities.

V. The charter (Hittell, 933) provides for the appointment of "*subordinate officers*," etc. We also find there among the corporate powers a power "to appoint such officers and to remove them, except that no trustee shall be removed unless in a certain way." Plainly here the appointment of other than subordinate officers is made a corporate power and if we do not include "trustees" as officers, no force is given to the evidently studious omission of the word "subordinate." Besides, trustees are expressly named here as of the officers to be appointed and removed as a corporate act. Next it provides for the substantial part of electing trustees, that they shall be elected by the stockholders in such mode as the by-laws may prescribe, subject, however, to certain formalities required by the charter itself. Next that vacancies shall be filled "in the manner" prescribed by the by-laws. There is a distinction between the *manner* and the *substance* of an election. The intention of the legislature

State ex rel. Corey v. Curtis.

was to allow the by-laws to do no more than regulate the mere form of filling vacancies. *Kearney v. Andrews, supra.*

VI. It was not the intention of the framers of this by-law to give a double vote. They were providing a presiding officer for certain deliberative assemblies, and the fair inference is that they used the words as Cushing defines them, and the fact which appears by the uncontradicted evidence of Grayson and Baldwin, that for fourteen years after their pretended adoption no double vote was ever before attempted to be cast, gives additional force to this construction. It shows the practical interpretation put upon this language. It is only by inference that it can be said to give a double vote. It says the vacancy shall be filled by the other trustees in office, not by the board as a board, and it is sought to piece this out by reference to a distinct by-law, which is void on its face, as expressly contravening the charter provision that at all meetings of the board a majority shall rule.

VII. To be an officer *de facto* one must have the reputation of being so *prima facie* at least. He must by some presumption seem to be so. Then third persons may safely act upon such presumption. Angell & Ames, Sec. 287; 6 East. 368; Tapping on Mandamus, 77 to 230; *McCullough v. Curtis*, 3 Nev. 202; 2 Abb. N. S. 290; 35 Missouri, 25; 4 Gill, 460; A. & A., Sec. 139; 11 Paige, 124; 21 Penn. 146; 50 Mo. 595; 10 E. C. L. 622.

VIII. Here Corey is maintaining his right to oust Curtis and according to all the cases he must show himself the officer *de jure*. No case can be found where the plaintiff succeeded because he was elected by a *de facto* board. Lyle was never a *de facto* officer as shown by the New Hampshire and other cases cited. The other side persist in putting the case as if Corey had got into possession and Curtis was trying to enjoin or oust him. The courts will never aid in consummating an inchoate wrong, though when an officer

State ex rel. Corey v. Curtis.

has succeeded in getting into peaceable possession *de facto*, they may refuse to oust him except in a particular way. And it was never heard of before, where an officer has succeeded in getting into possession *de facto* and done acts, though out of regard to the rights of the public his acts may be sustained, yet that when his attempts have been successfully resisted and he kept out of office, the courts will be active to put him into office in order that he may do acts *de facto* and thus deceive the public and create rights by estoppel and against law.

IX. The by-law is clearly void in so far as it attempts to authorize less than a majority of the trustees to perform corporate acts generally. Then, even if this particular corporate act could be authorized by the by-law to be performed by less than a majority, we have the case of one single entire clause in a by-law void in part and therefore by all the authorities void *in toto*.

By the Court, HAWLEY, J. :

The board of trustees of the Ophir Silver Mining Company consists of seven members. At a meeting held on the 29th day of June, 1874, there were present six trustees, viz. : Lissak, Locan, Hassey, Baldwin, Grayson and Hall. On motion, a vote was taken to elect a trustee to fill a vacancy occasioned by the resignation of trustee Peart. This vote resulted in a tie; trustees Lissak, Locan and Hassey voting for W. S. Lyle; trustees Baldwin, Grayson and Hall for J. S. Wall; whereupon trustee Lissak, president of the board, having voted as a trustee, claimed the right to give the casting vote under art. VI. of the by-laws of the corporation, which provides that the president "shall have the casting vote at all meetings of the stockholders and trustees," and again voting for W. S. Lyle, declared him duly elected a trustee.

State ex rel. Corey v. Curtis.

At the same meeting, motions were made to declare vacant the position of superintendent held by respondent, and to elect a successor. Trustees Baldwin, Grayson and Hall objected to Lyle voting, and claimed that he was not legally elected a trustee, having only received three votes, and further claimed that there was no vacancy, respondent Curtis having been regularly elected superintendent on the 22d day of March, 1874, and never having been legally removed. Notwithstanding these objections the motions were carried in the affirmative and the relator, Corey, was elected superintendent by the votes of trustees Lissak, Locan, Hassey and Lyle; trustees Baldwin, Grayson and Hall voting in the negative.

1. It is contended on the part of respondent that the by-laws of the Ophir company are void. First, because they were adopted by the stockholders instead of the trustees. It appears that they are the only by-laws ever adopted by the corporation. They are found properly recorded in the books kept by the board of trustees, and have been used, acted upon and referred to as the by-laws of the corporation, both by the trustees and stockholders, ever since their adoption in 1860. Under these circumstances, we think they must be considered and treated as the regular by-laws of the corporation. Second, it is claimed that the particular section of the by-laws under which the president is given the casting vote is void, because inconsistent with section 7 of the act providing for the formation of corporations, which declares that: "A majority of the whole number of trustees shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act." General Laws of California, 1 Hitt. 938. But relator contends that under section 5 of said act, an exception is made in cases where the election is to fill a vacancy. Section 5 provides: "When any vacancy shall happen among the trustees by death, resig-

State ex rel. Corey v. Curtis.

nation or otherwise, it shall be filled for the remainder of the year in such manner as may be provided by the by-laws of the company. 1 Hitt. 936. Article III of the by-laws provides that: "Vacancies in the board of trustees shall be filled by the other trustees in office." Relator also claims that an election to fill a vacancy is not a corporate act and therefore not necessary to be performed by a majority of the board.

Is the election of a trustee to fill a vacancy a corporate act? To have perpetual succession and, of course, the power of electing members in the room of those removed by death or otherwise is among the ordinary incidents of a corporation. 2 Kent Com., Sec. 277. "The power to fill vacancies in a corporation and elect officers is a corporate incident." Angell & Ames on Corporation, Sec. 144; *Kearney v. Andrews*, 2 Stockton Ch. (N. J.) 72; *Gashwiler v. Willis*, 33 Cal. 19. In the general provisions concerning corporations we find that every corporation has power: "To appoint such subordinate officers and agents as the business of the corporation shall require." 1 Hitt. 746. In the act, under which the Ophir was incorporated, it is provided that the corporation shall have power, "to appoint such officers, agents and servants, as the business of the corporation shall require." 1 Hitt. 935. Trustees are elective officers of the corporation; and it follows from the foregoing provisions that their election is a corporate act. Being a corporate act it must be exercised in the manner required by the charter. The act provides that "a majority of the persons duly assembled as a board shall be valid as a corporate act." The by-law creates a right of election contrary to the charter. It authorizes an election to fill a vacancy by a less number than the majority. For instance, in the present case, there is an equality of votes; and instead of the election being made by a majority the president really names the trustee. A corporation cannot make by-laws contrary

State ex rel. Corey v. Curtis.

to its charter, and it appears to us quite clear that this particular portion of the by-law, if it is susceptible of the construction claimed for it by relator's counsel, is in violation of the charter under which, and in conformity with which, all corporate powers, all corporate acts, must be exercised. We must not be understood as deciding that the power of electing trustees to fill vacancies was delegated to the board of trustees; for upon this we express no opinion; but if so delegated it was not the intention of the legislature to invest the trustees with the power to exercise such a right in any other manner than other corporate acts are exercised; and no right of performing any corporate act unless by a majority vote having been given by the charter, it was not within the power of the stockholders or trustees to change this provision by adopting a by-law giving to the president a double vote. The *manner* of the election might be regulated by the by-laws, but the *substance* must be in conformity with the charter. *The State v. Adams*, 2 Stew. (Ala.) 237; *Kearney v. Andrews*, *supra*.

Again; it is conceded that the president would not have the right in all cases to give the casting vote and respondent's counsel contend, for this reason, that the by-law is void; that a single entire clause of the by-laws cannot be good in part and bad in part. We think that this objection is also fatal to this particular clause of the by-laws. In *The King v. The Steward, etc., of Faversham*, Lord Kenyon, Ch. J., said: "Though a by-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other." 6 T. R. 356. "If a by-law be entire, so that the part which is void influences the whole, the entire by-law is void." Ang. & A. on Cor., Sec. 358. The same doctrine has frequently been announced in the construction of statutes. It is true, as was said by Shaw, C. J., in *Fisher v. McGirr*, that "there is nothing inconsistent in declaring one part of the same statute valid and an-

State ex rel. Corey v. Curtis.

other part void." 1 Gray, 22. This is sustained by the decisions of this Court. *Evans v. Job*, 8 Nev. 342. But in all the cases brought to our notice where this principle has been applied, it is where the respective portions of the statute were wholly independent of each other. Judge Cooley says: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, * * * but whether they are essentially and inseparably connected in substance." Cooley's Con. Lim., 178. This distinction is always recognized in the authorities. *Lathrop v. Mills*, 19 Cal. 530.

2. Was Lyle such a *de facto* officer as to make his acts valid and binding? What is an officer *de facto*? "One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *Parker v. Kett*, 1 Lord Raymond, 658; *The King v. The Corporation of Bedford Level*, 6 East, 368. "One who actually performs the duties of an office, with apparent right and under claim and color of an appointment or election." *Brown v. Lunt*, 37 Maine, 428. "One who has the color of right or title to the office he exercises; one who has the apparent title of an officer *de jure*." *Brown v. O'Connell*, 36 Conn. 451. "On the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure*." *Mallett v. Uncle Sam G. & S. M. Co.*, 1 Nev. 197; *Plymouth v. Painter*, 17 Conn. 588. Such in brief are the general definitions under which we are asked to declare Lyle a *de facto* trustee. We do not deem it necessary to examine minutely all the points with the numerous subdivisions which were ingeniously and elaborately argued by the respective counsel with a citation of authorities indicative of an extended and praiseworthy research; but shall confine ourselves to what we deem the controlling points in this branch of the case.

State ex rel. Corey v. Curtis.

The principle of sustaining the acts of persons as officers *de facto* is designed as a shield for the protection of the public and of third persons, who are not cognizant of the true state of the facts and are not required by the law to inquire into the title of one who is found exercising the duties of a public office. In order to protect third persons transacting business with such officers under such circumstances as to induce them to believe that they were dealing with legal officers, the law has reached out its strong arm to a dangerous extent, upon the principle that although not officers *de jure*, they were officers in fact whose acts public policy required should be considered valid. Such a principle certainly ought not to be extended to a case where the rights of the public are not affected, nor where all the parties interested have knowledge that the person pretending to be an officer is not an officer *de jure*; for in such a case the reason of the rule no longer exists and the law should not be invoked for protection. As was argued for the crown in the case of the *King v. Lisle*, decided in the court of king's bench in 1738, "As an officer *de facto* is a notional creature only, erected by the law in order to answer the ends of justice and equity under particular circumstances, his power ought not to be extended further than what is absolutely necessary for that purpose." Andrews, 166. In the case of *The King v. The Corporation of Bedford Level*, Lord Ellenborough, C. J., said: "In this case Gotobed was never more than deputy; and therefore after the death of his principal he never could have had the reputation of being more than deputy; but such reputation must necessarily have ceased with the knowledge of the death of his principal. When that fact was notorious to the owners of land in this level, no one could have registered his deeds with him under a belief that he was acting as the assistant of one, who by the course of nature had ceased to fill the office, in the execution of which he was to be assisted by the deputy."

State ex rel. Corey v. Curtis.

Although the law does not always take into consideration the mode by which the office was obtained, yet in order to make a person an officer *de facto* it does require that he should in some way be put into the office and that he should also have secured such a holding thereof as to be considered really in peaceable possession and actually, exercising the functions of an officer. It is shown by the affidavits of Baldwin and Grayson that "the first time W. S. Lyle ever attempted to act as a trustee of said company was on the said 29th day of June, 1874, when the president attempted to declare him elected as a trustee." There was no acquiescence in his election. The three trustees who voted against him endeavored to prevent his voting and protested against his being allowed to vote or to take any part whatever in the proceedings of said board. It is true that subsequent to his pretended election a motion was made and carried by an unanimous vote to allow a certain bill. It is also true that Lyle intruded himself by force and actually voted as a trustee at a subsequent meeting of the board. But these acts did not make him a *de facto* trustee. In the case of *The State v. Wilson* it was attempted to be proved that one Evans, who had signed orders as adjutant, was in fact adjutant because he acted as such afterwards at a muster. The court said: "The evidence that Evans acted as adjutant afterwards at the muster cannot have relation back, or prove the existence of the authority at the time the orders were issued. *There should have been some evidence that he had acted previously.*" 7 N. H. 547. In *Golding v. Clark*, the court held that "in the case of proceedings of an ancient date, it might be presumed from the regularity of the subsequent proceedings, from the acquiescence of parties interested or from other circumstances, that the records upon the books of a proprietary were made by the clerk, either duly elected or *de facto* exercising the office; but no such presumption can be properly allowed where the

State ex rel. Corey v. Curtis.

transactions recorded are of recent date and the facts admit of ready proof. It was therefore necessary to introduce some evidence tending to show that the supposed clerk acted as such under claim of an election to the office, *beyond the mere fact of making the records in question.*" 34 N. H. 154. In *Hall v. Manchester*, the same principle was announced. The record failed to show that the selectmen had been elected and their acts in laying out a highway were attempted to be upheld by showing that they acted as such during the year. The only evidence offered was "that two of them undertook to lay out the highway in question." The court said: "There is nothing else in the whole case tending to show that they acted in that capacity and their authority to do that one act is disputed here, *and is the very question now in controversy*; and to hold that this act furnished any evidence of their authority to act would be begging the whole question." 39 N. H. 301.

While it is an established principle that the acts of all public officers having the presumptive evidence of title by law, commission, election, or otherwise, and the actual peaceable possession of office, are valid as far as they affect the interests of the public or of third parties; yet, we think, as was held in *Vaccari v. Maxwell*, "that the decisions in relation to the acts of officers *de facto* are reasonably to be restricted to those who hold office under some degree of notoriety, or are in the exercise of continuous official acts, or are in possession of a place which has the character of a public office." 3 Blatch. 377. If the opposing trustees had acquiesced in the selection of Lyle, and allowed him, without objection, to vote upon the removal of respondent and the election of relator, then it might be claimed with some degree of reason, supported by authority, that he was a *de facto* officer; and if Curtis had surrendered up his authority and allowed Corey to act, then the latter would have been superintendent *de facto*, and all his

Skinker v. Clute.

acts as such would have been binding upon the corporation, although he had not been legally elected to the position. But by what parity of reasoning can it be said that Lyle had any authority to bind the corporation? He was not elected trustee. He did not have even the color of an election. The very record offered for the purpose of proving his election shows affirmatively that he was actually defeated, not having received a majority vote. He did not have even "an apparent or *prima facie* right" to act as a trustee. His right to vote was denied. Neither the interests of the public nor the rights of third parties were involved or in any way affected by the proceedings. The whole contest is narrowed down to a proposition between two opposing factions equally divided in number as to which shall have the control and management of the property owned by the corporation. None of the reasons which invoke the protection of the law in order that the ends of justice may be attained can here be urged. The respondent being entitled to the position he holds, it follows that the writ must be denied.

It is so ordered.

JOHN SKINKER, RESPONDENT, v. F. W. CLUTE *et al.*,
APPELLANTS.

ADMISSION BY PLEADING—SETTING UP OF COUNTER CLAIM. Where, in an action for goods sold and delivered, the answer admitted the receipt of the goods; did not deny their value and that no part of it had been paid; but denied all indebtedness and set up a counter claim arising out of the same transaction: *Held*, an admission of the plaintiff's claim as set forth in the complaint, subject to the counter claim.

ADMISSION OF VALUE OF GOODS SOLD AND DELIVERED—DRAYAGE ITEMS. Where, in an action for goods sold and delivered, there was no denial of their receipt and value; and on the trial an open account of them, including charges for drayage, was offered and received in evidence without objection: *Held*, that defendant could not afterwards object to the items for drayage.

Skinker v. Clute.

INTEREST ON BALANCE OF ACCOUNT — BALANCE ASCERTAINED BY PLEADING.

Where an answer admitted an account for goods sold and delivered: *Held*, that such answer amounted to an ascertainment of the balance of account and that under the statute (Comp. Laws, Sec. 32) interest was due from that time upon such balance.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

This was an action by John Skinker of San Francisco, California, against the firm of Clute & Young of Pioche, to recover \$314 30, for fuse sold and delivered, with interest thereon from June 10, 1873. The answer, as stated in the opinion, failed to deny the material facts alleged; but set up by way of counter claim a claim for \$500, for alleged breach of an agreement by plaintiff to furnish defendants with all the powder and fuse they might require. The action was tried by jury, and resulted in a verdict in favor of plaintiff for \$312 93, and judgment accordingly.

The account offered in evidence by plaintiff was apparently taken from his books, and included items of powder and fuse furnished at various times from May 14, 1872, to June 10, 1873, with items of drayage for each lot so furnished. It also contained credits by cash received and two items of interest, one on the account up to June, 1873, and one on the balance of \$314 30, then due.

Defendants appealed from the judgment and an order overruling their motion for a new trial.

Pitzer & Corson, for Appellants.

I. The court erred in instructing the jury that the demand of the plaintiff was admitted by the pleadings, because this must have been understood by the jury as including the items of interest and drayage, which were contested by defendants on the trial. The admission was only as to the sale and delivery of the fuse.

Skinker v. Clute.

II. There is no proof of an agreement or custom to charge drayage; and as items for drayage are included in the itemized bill and must have been allowed by the jury and included in their verdict, the judgment to that extent at least was erroneous.

III. The proof clearly shows this to have been an open and unsettled account. Hence the allowance of interest was error. *Flannery v. Anderson*, 4 Nev. 437, and cases there cited.

Henry Rives, for Respondent.

I. Though the answer in its first part contains a denial of the allegations of the complaint respecting defendants' indebtedness and also a denial "that they ever purchased any fuse except as thereafter stated," it subsequently admits that plaintiff furnished them the fuse described, and now denies that it was worth the amount claimed. This was an admission of plaintiff's demand.

II. While there was no proof of a custom to charge drayage such a custom is so universal and well known, not only among merchants but all others having any knowledge of business, as not to require proof. The jury by allowing the charge for drayage and part of the charge for interest virtually find an agreement and custom warranting both charges. The account was closed and the balance ascertained long before the action was brought.

By the Court, BELKNAP, J. :

This action was brought to recover \$314 30 for goods sold and delivered. The answer admits the receipt of the goods. It does not deny their value and that no part of it has been paid, but denies all indebtedness, and sets up as counter claim a breach of contract arising out of the transaction sued

Skinker v. Clute.

upon and prays damages therefor in the sum of five hundred dollars. The reasonable construction of this pleading is an admission of the plaintiff's claim to the extent set forth in the complaint, subject to the defendants' counter claim. This interpretation was adopted by the district court and is embodied in the following instruction: "The demand of the plaintiff is admitted by the pleadings, and unless the defendants establish their right to their counter claim in the way of damages to your satisfaction your verdict must be for the plaintiff." An open account between the parties, particularizing their transactions and embracing items of drayage and interest, was received in evidence without objection. It is now said in behalf of appellants that by this instruction the jury must have considered that the charges of interest and drayage were confessed by him, whereas in fact, it is said, he contested these items throughout the trial. The answer to this is that the record fails to show such objection, and it would have been inadmissible under the pleadings, for the allegation of value (in which these items were included) not being denied, must be taken as confessed. The complainant prays for interest upon \$314 30, from June 6, 1873. It would seem that this interest was not allowed, since the verdict is for \$312 93. In the case of *Flannery v. Anderson*, 4 Nev. 437, it was decided under Sec. 32 (Comp. Laws) that in the absence of an express contract thereto in writing, interest was not recoverable upon money due upon an open account. The same statute declares that interest shall be allowed upon money due on the settlement of accounts from the day on which the balance is ascertained.

In our view of this case the account was liquidated and the balance ascertained by the admissions of the answer, and interest upon the balance was, therefore, allowable.

The judgment and order refusing a new trial are affirmed.

Magnet M. Co. v. Page and Panaca S. M. Co.

MAGNET MINING COMPANY, RESPONDENT, v. PAGE
AND PANACA SILVER MINING COMPANY, APPEL-
LANT.

INJUNCTION, WHEN TO BE DISSOLVED—DENIAL OF EQUITIES. An injunction granted upon a complaint, the allegations of which have been fully and fairly denied by the answer, should on motion and in the absence of further showing be dissolved, unless in exceptional cases when good reason appears for continuing it.

MOTION TO DISSOLVE INJUNCTION ON COMPLAINT AND ANSWER. On a motion to dissolve an injunction, heard upon complaint and answer alone, the full and fair denials of the answer are taken as true.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The plaintiff claimed to be the owner and in possession of the quartz ledge known as the Panaca, on Panaca Flat, Ely Mining District, Lincoln County, and that defendant, on April 16, 1874, entered upon a portion of the same, and ejected plaintiff therefrom to its damage in the sum of thirty thousand dollars. The complaint also set forth that defendant had extracted from the mine valuable ores, and threatened to continue the extraction and removal of ores, and prayed for damages, an injunction and other relief. Upon this complaint, which was filed June 1, 1874, the district judge ordered the application for an injunction to be heard on June 12, 1874, and in the meanwhile issued a restraining order to "remain in full force and effect until the 12th day of June, A. D. 1874, at 10 o'clock, A. M., of that day, and until further order herein."

The defendant filed its answer on June 10, denying fully all the material allegations of the complaint. Several stipulations were afterwards made continuing the time for hearing the application for an injunction, but it seems that application never came up. On July 7, defendant moved to dissolve the restraining order; and on July 10, that order was modified "so as to allow the defendant to continue the

working of the ground in controversy, and described in the foregoing order, and to raise the ore to the surface or dump, and then deposit the same upon the dump, but not to remove the ore from the dump or from the vicinity of the shaft, incline or dump of defendant's works." On July 16, an order was entered denying the motion to dissolve the restraining order, and continuing that order, as modified, in force pending the action.

From these orders defendant appealed.

A. B. Hunt and Henry Rives, for Appellant.

I. The time embraced in the order restraining defendant only extended from the time of granting the order to the time set for the hearing. *Prader v. Grim*, 13 Cal. 586. The plaintiff could not, by its own act of negligence, or connivance, extend that time indefinitely, and so continue the restraining order in force. And the answer in the mean time coming in and denying all the equities of the bill, conclusively established the fact that plaintiff was not entitled to the injunction asked. *Lady Bryan G. & S. M. Co. v. Lady Bryan M. Co.*, 4 Nev. 44; *Gagliardo v. Crippen*, 22 Cal. 362.

II. The judge could not enjoin defendant beyond the time set for the hearing, or the time to which the hearing was continued, to wit: June 22, because he had decided, so says the order, that the defendant was entitled to a hearing before any injunction should issue, and *in the mean time* defendant was restrained from the commission of the acts complained of. No continuance was had beyond June 22, either by stipulation or order, or otherwise. Defendant was on hand on June 22, as ordered; no judge or plaintiff was there. Had plaintiff been present, and the judge been unable to hear the parties, he might have referred the matter to some other judge for hearing. Comp. Laws, Sec. 1555.

III. The judge should have granted the motion to dissolve the restraining order, for the reason that plaintiff had

Magnet M. Co. v. Page and Panaca S. M. Co.

waived all its rights to show cause why an injunction should issue. The failure of plaintiff to prosecute its application was a confession of its inability to maintain it; and the restraining order had expired by its own limitations. *Dowling v. Polack*, 18 Cal. 625; *Loomis v. Brown*, 16 Barb. 325; *Sherman v. N. Y. C. Mills*, 11 How. 269; *Coatts v. Coatts*, 1 Duer, 644; *Methodist Church v. Barker*, 4 Smith, 463.

IV. The injunction pending the action should have been denied, for the reason that as a general rule plaintiff must not only have the title to the ground claimed by it, but his title and right of possession must be clear, well established and not in dispute. Here defendant was shown to have been in possession for a number of years, and had expended large sums of money upon the mine claimed by it, and from which it was enjoined from removing ore. *Real Del Monte Mining Co. v. Pond Mining Co.*, 23 Cal. 82.

Garber, Thornton & Kelley, for Respondent.

No brief on file.

By the Court, BELKNAP, J.:

Upon the filing of the complaint in this case an application was made for an injunction restraining the defendant from extracting or removing ore from certain described mining ground of which the plaintiff claims to be possessed in fee. An order was made fixing the time for the hearing of the application for the injunction; and in the mean time the defendant was restrained from the commission of the acts complained of.

The hearing of the application was continued several times by stipulation, and, for some cause unexplained by the record, was not heard upon the day finally set for hearing. The merits were reached by motion to dissolve the restrain-

Eureka Mining and Smelting Co. v. Way.

ing order. It was then modified so as to restrain defendant from removing ore from the premises in controversy.

The answer fully and fairly denies plaintiff's alleged title and possession, and no testimony was offered upon either of these points. The questions of title and possession, therefore, stand upon the pleadings. A complete denial by the answer is taken as true, and, in the absence of testimony establishing the material allegations of the complaint, the injunction should be dissolved, unless good reasons appear for continuing it. So, in New York an injunction was retained where it could work no injury, while to dissolve it might do so, notwithstanding a full denial of the equities of the bill. *Bank of Monroe v. Schermerhorn*, Clark's Ch. 309. And where the statement of the defendant was extremely improbable. *Moore v. Hylton*, 1 Dev. Eq. 429. And where the denial was grounded upon information and belief. *Poor v. Carleton*, 3 Sum. 70.

But no reasons appear to make this an exceptive case. The denials of the answer must be taken as true, and so taken, the plaintiff has no ground for equitable relief.

The order appealed from is reversed and the injunction dissolved.

EUREKA MINING AND SMELTING COMPANY, APPELLANT, v. FRANK WAY, *et als.*, RESPONDENTS.

POSSESSION OF TIMBER LAND—RIGHTS ACQUIRED FROM PREDECESSORS. In a suit for trespass in cutting and removing timber, the court charged that a mere survey and marking of boundaries of public land was insufficient to entitle plaintiff to recover, but that he must have been in the actual occupation of the same, using it for the purpose for which it was adapted: *Held*, clearly erroneous under the circumstances, as ignoring any rights of use or occupation derived from grantors.

Eureka Mining and Smelting Co. v. Way.

OCCUPATION OF TIMBER LAND. Where, in a suit for trespass in cutting and removing timber, the court charged that by the term occupancy of timber land was meant a subjection of the same to will and dominion and a use of the same for the purpose for which it was located and not a mere residence thereon, and that if plaintiff did not so use and occupy the land the verdict should be for defendant: *Held*, clearly erroneous under the circumstances, as ignoring rights derived from grantors.

TRANSFER OF RIGHTS TO USE TIMBER LAND. The occupation or use of land valuable for timber by a person's grantors inures as much to the grantees' interest as any other act; and if such grantor would have the right to recover in an action on account thereof, his grantee would have the same right.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

This was an action to recover two thousand dollars damages for alleged trespass in cutting down and removing trees from a tract of six hundred and forty acres of land in Eureka County, claimed to be owned by and in the possession of plaintiff and to have been owned and in the possession of its predecessors for three years previously. The answer denied that plaintiff or any of its predecessors ever was the owner, in possession or entitled to the possession of the land or any part thereof, and set up ownership and possession in defendant Way. The cause was tried in March, 1874, before a jury.

The court, at the request of the defendant, instructed the jury as follows:

1. "If the jury believe from the evidence that the boundaries of the land in controversy have not been distinctly marked by the plaintiff or its grantors or predecessors in interest, they will find a verdict for defendant.

2. "If the jury believe from the evidence that the boundaries of the land in controversy have not previous to the entry of Way thereon been marked by metes and bounds, so that the boundaries could have been readily traced, and the extent of such claim easily known, they must find a verdict for the defendant.

Eureka Mining and Smelting Co. v. Way.

3. "The jury are instructed that a mere survey and marking of boundaries of the public lands is insufficient to entitle plaintiff to recover in this action. The plaintiff must have been in the actual occupation of the same, using it for the purpose for which it was adapted.

4. "The jury are instructed that by the term 'occupation' of timber land is meant a subjection of the same to the will and dominion and a use of the same for the purpose for which it was located, and not a mere residence thereon. And if they find that the plaintiff did not so use and occupy the land in dispute, they will find a verdict for the defendant.

5. "The jury are instructed that if they find for defendant, their verdict will be that 'we, the jury, find for the defendant.'"

Of the above instructions, the third and fourth are specially referred to in the opinion as being found on pages 150 and 151 of the transcript.

The instructions of plaintiff, which were refused, and for the refusal of which plaintiff claimed error, were as follows:

"The jury are instructed that the only object or purpose of the law, in requiring the boundaries of a tract of timber land to be marked and defined, is to notify innocent parties of the existence and extent of the claim, or to put them upon inquiry as to the character and extent of the claim."

"The jury are instructed that if the defendant caused the survey to be made of the ranches claimed by him in the names of Reeves and McLaughlin with the intent and understanding that the lands when surveyed were to be conveyed by them to him, and he, Way, then had knowledge of the existing rights and claims of the predecessors of the plaintiff herein, he (Way) can claim no rights under the deed from Reeves and McLaughlin against the plaintiff herein."

The jury returned a verdict in favor of defendant, and judgment was entered accordingly. Plaintiff moved for a new trial, which was refused; and it then appealed from the judgment and order.

Eureka Mining and Smelting Co. v. Way.

Hillhouse & Davenport, for Appellant.

I. All the instructions given at defendant's request are erroneous in this, that they each instruct that upon a certain state of facts the jury must find for defendant. The answer denied plaintiff's title to the whole, it is true, but defendant on the trial only attempted to set up title in himself to a portion of the tract described in the complaint.

II. The instructions in reference to occupation were so manifestly erroneous, that the mere statement of the objection demonstrates the error. The land was taken up, lines marked, houses and fences built, and wood and timber cut thereon, and hauled therefrom by the predecessors of plaintiff, who, on December 13th, 1872, succeeded to the interest of those who had so used the land. Way commenced his trespasses at that date. Still the court instructed the jury that the plaintiff must have been in the *actual occupation*. All acts of occupation and user of the land by the predecessors of plaintiff were ignored. The acts of those predecessors in interest certainly inured to the benefit of plaintiff. A grantee in a deed for timber land or any land succeeds to whatever interest the grantor may have had, and if the grantors or any of them of plaintiff had made use of the land for cutting wood therefrom, plaintiff certainly was entitled to claim the benefits of all acts they performed on the land. And again, the instructions virtually say there must be a continuous use of the land, and that plaintiff should have made such use, while defendant was trespassing; in effect, that plaintiff should have driven off the trespassers in order to make use of the land.

Thomas Wren and David E. Bailey, for Respondents.

I. The first instruction states the law in regard to marking the boundaries of the public timber lands in this State, in almost precisely the language of this Court; and so does

the second. The third and fourth should be read together, the fourth explaining the character of the possession of timber lands necessary to entitle a plaintiff to maintain the action. There must be an actual or constructive possession to maintain trespass. *Courchaine v. Bullion Mining Co.*, 4 Nev. 369.

II. What constitutes possession either actual or constructive of public timber lands? That character of inclosure together with continuous occupation as would entitle a person to recover in ejectment. *McFarland v. Culbertson*, 2 Nev. 283; *Robinson v. Imperial Co.*, 5 Nev. 44, and authorities therein cited.

III. If plaintiff had been ousted from the possession of the land by defendant he should have commenced his action of ejectment, not trespass. The instructions asked by plaintiff are manifestly erroneous.

IV. It is contended that inasmuch as defendant only showed a right to the possession of three hundred and twenty acres, plaintiff should have had a verdict for the trespasses supposed to have been committed on the other part of the tract. Trespasses were charged upon a tract of land a mile square; but because defendant could not deny that he cut timber within the mile, must he be held to admit that he cut timber upon every acre or fractional part of an acre?

By the Court, WHITMAN, C. J.:

The evidence in this case was conflicting, and thereon the jury found for respondents, as might properly happen. There is no force in the point that there was no justification for the verdict as an entirety, for that respondent Way had trespassed to some extent upon property proven to be that of appellant. These were material points at issue, and the verdict may be based either upon the hypothesis that respondent was rightfully in possession of three hundred and

Eureka Mining and Smelting Co. v. Way.

twenty acres of the land described in the complaint; and that his takings were confined to that area, upon both which points there is testimony; or upon the general proposition that appellant had no right of recovery for failure to make out title, possession or right of possession to any of the described property, to which end there was testimony tending; in which case there could have been no trespass against him, as the land in such case, so far as private parties are concerned, would have been as rightfully open to one as to the other.

Nor was there any error in the refusal of the instructions asked by appellant, as each contains some error of legal excess or defect, which need not be specifically pointed out, as undoubtedly such will be apparent to counsel upon cool inspection.

Nor is there any error in the instructions given for respondents, except in those on pages 150-151 of the transcript; and in those, the error is, as claimed by counsel for appellant, so obvious, that he who runs may read. They entirely ignore any rights of use or occupation which appellant may have derived from its predecessors or grantors; and this not upon the theory of non-connection; as it must be presumed, from the instruction first given for respondents, that the court recognized a possible chain of title or succession in interest.

Occupation and user or either by appellant's predecessors or grantors must inure as much to its benefit as any other act or acts. In other words, if appellant had predecessors or grantors, and if they or either of them would have been entitled to recover in the present action, then so would appellant, the successor to any and all existent rights. This doctrine is virtually, if not in express terms, repudiated by the instructions referred to; and the natural conclusion therefrom is, that there must have been an actual occupation

State ex rel. Harding v. Moor.

and personal user by this identical appellant, else no recovery.

Thus the jury may have been influenced to the verdict given and so the appellant have been prejudiced.

Wherefore the order and judgment appealed from are reversed.

THE STATE OF NEVADA EX REL. GEORGE P. HARDING *v.* W. F. MOOR, AND CERTAIN REAL AND PERSONAL PROPERTY.

JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE.—As a district court on appeal from a justice has exactly the same jurisdiction as the justice, a plea cannot be considered in the district court on such appeal, which could not have been considered in the justice's court.

PROCEEDINGS OF DISTRICT COURT BEYOND ITS JURISDICTION TO BE ANNULLED.

Where on appeal from a justice's court, the defendant was allowed in the district court to file an answer, presenting an issue which could not have been tried in the justice's court and obtained judgment thereon: *Held*, That the district court exceeded its jurisdiction, and that its proceedings and judgment should be annulled.

CERTIORARI from the Supreme Court to the District Court of the Second Judicial District, Douglas County.

The relator set forth in his affidavit that he as district attorney of Douglas County, on March 4, 1874, commenced an action in the justice's court of Genoa township, Douglas County, in the name of the State of Nevada, and against W. F. Moor, and certain real and personal property for the purpose of recovering State and county taxes assessed for the year 1873, amounting to \$94 83; that due service was made by the summons in said action; that defendants therein failed to appear in the justice's court; that a judgment by

State ex rel. Harding v Moor.

default was regularly entered against them; that afterwards they appealed to the district court of the second judicial district in and for Douglas County; that the cause was placed on the calendar of said district court, and that when the same came on for hearing, the defendants appeared and asked and obtained against relator's objections leave to file an answer.

It further appeared from the affidavit that the real property so sued, and for the taxes of which the action was instituted, was a ranch or possessory claim of 160 acres, described as lying on Walker river, and bounded north and west by vacant land, south by State line, and east by land of Fairburn. The answer put in by defendants, alleged that the said property, and the whole thereof, was situated in the state of California, and not any part of it in the County of Douglas. Upon this answer the defendants had judgment in the district court.

Relator prayed for a writ of review and certiorari directed to the district court, on the ground that in allowing the defendants to file an answer, and in considering the same, and rendering judgment, it had exceeded its jurisdiction, for the reason that the trial and determination of the issue raised by the answer involved the title and right of possession to real estate, and also the legality of an assessment and tax. The writ of review was accordingly issued and the proceedings in the action certified up.

G. P. Harding, for Relator.

Ellis & King, for Respondent, Moor.

By the Court, HAWLEY, J.:

The State brought suit in the justice's court and obtained judgment by default. Defendant appealed to the district court, and was therein allowed to file an answer which

Washoe County Commissioners v. Hatch.

presented an issue that could not have been tried in the justice's court. Upon the trial of the issues thus raised defendant obtained judgment. To set aside this judgment relator made this application for a writ of certiorari, claiming that the district court exceeded its jurisdiction.

In the case of *Peacock v. Leonard*, this Court decided that a district court on appeal had exactly the same jurisdiction as the justice of the peace, from whose court the appeal is taken. 8 Nev. 84.

As the justice could not have tried this case upon the answer filed in the district court, it follows from the rule announced in *Peacock v. Leonard*, that the proceedings and judgment in the district court should be annulled.

THE BOARD OF COUNTY COMMISSIONERS OF
WASHOE COUNTY v. ANDREW J. HATCH,
COUNTY SURVEYOR.

MANDAMUS IMPROPER WHERE EJECTMENT AFFORDS FULL REMEDY. In a case where ejectment affords a plain, speedy and adequate remedy, as where county commissioners desire to eject a county officer from a room in the court house, mandamus can not be maintained.

This was an original application to the Supreme Court by Thomas K. Hymers, E. B. Towle and Peleg Brown, commissioners of Washoe County, for a mandamus to compel the county surveyor to vacate his room in the court house at Reno and remove to another room assigned him. The petition set forth that the commissioners in 1873 appropriated to respondent a room on the second floor of the court house; that at that time the business of said respondent as county surveyor required more space than at present on account of the unexhausted land grants from the

Washoe County Commissioners v. Hatch.

United States to the State of Nevada; that said grants had been exhausted and the business of the surveyor did not require so much room; that the commissioners themselves and the county assessor did not have sufficient office accommodations; that in consideration of such facts the commissioners on June 6, 1874, unanimously passed an order as follows:

“The county commissioners of Washoe County, having no office for the transaction of their official business as such commissioners and it being necessary that they have an office in the court house of the county, it is hereby ordered that the northeast room on the second floor of the court house now occupied by the county surveyor be and is hereby appropriated for the use of the county commissioners jointly with the assessor and that the room now occupied by the county assessor be and is hereby appropriated for the use and occupancy of the county surveyor, and that the county surveyor vacate said room now occupied by him and move into and occupy as his office the room now occupied by the county assessor, and that the county assessor vacate the room now occupied by him and move into and occupy as his office the room now occupied by the county surveyor, and that a copy of this order duly certified by the clerk of this board be served upon the county surveyor and county assessor by the sheriff of Washoe County.”

The petition further set forth that the foregoing order was duly served on the surveyor and assessor; that the assessor was ready and willing to vacate his office and remove in accordance with the order; but that the respondent, the county surveyor, was unwilling and failed, neglected and refused to do so; that thereupon the commissioners passed a further order, as follows:

“Whereas, at the last regular meeting of this board an order was passed directing the county surveyor to vacate the office now occupied by him for the joint occupancy of the

Washoe County Commissioners v. Hatch.

county assessor and this board, and such order not having been obeyed. It is now ordered that the said office be so vacated within ten days from this date, and the district attorney is hereby directed to institute such legal proceedings as he may deem necessary to enforce the said order, if not complied with within the time above specified."

The petition further set forth that the respondent refused to obey the second order, as he had refused to obey the first one, and that he had expressed a determination, without regard to such orders, to occupy his room until January, 1875, and so long as he should continue to hold the office of county surveyor.

An alternative writ of mandamus was issued in accordance with the prayer of the petition, requiring the respondent to show cause on August 22, 1874, why he had not obeyed the orders of the commissioners. Respondent appeared at the appointed time and moved to quash and dismiss the writ on the grounds; first, that the application was not made by the real party in interest; second, that the proceeding was not one to compel the performance of an act which the law specially enjoined as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he was entitled; and, third, that there was a plain, speedy and adequate remedy in the ordinary course of law—by ejectment.

Robert M. Clarke, for Respondent.

Wm M. Boardman, District Attorney, and *Haydon & Cain*, for Relator.

By the Court, HAWLEY, J.:

Defendant moves to dismiss the alternative writ of mandamus issued herein. We are clearly of the opinion that this motion should be granted. If the board of county

Morgan v. Eureka County Commissioners.

commissioners has the full control and management of the several rooms in the court house, as claimed by plaintiff, (and for the purposes of this motion conceded by defendant,) it follows that when the room now occupied by defendant was assigned to him he became a tenant at will of the county, the board acting as its agent; and when the order was passed requiring him to vacate said room his tenancy ceased and he became a trespasser.

The plaintiff has the control and management of all suits for or against the county; and it is evident that by a suit of ejectment the county has a plain, speedy and adequate remedy at law.

The motion is granted.

**DANIEL MORGAN, RESPONDENT, v. THE BOARD
OF COUNTY COMMISSIONERS OF EUREKA
COUNTY, APPELLANT.**

TOWN GOVERNMENT ACT OF 1873—AFFIDAVIT BY "TAX-PAYER OF COUNTY" INSUFFICIENT. Under the act of February 21, 1873, providing for the government of a town or city in case of the filing of a certain affidavit by a resident and tax-payer of such town or city (Stats. 1873, 74, Sec. 16): *Held*, that an affidavit stating affiant to be "a resident and tax-payer in the county" was insufficient.

TOWN GOVERNMENT ACT—AFFIDAVIT AS TO "GENUINENESS OF SIGNATURES." Where the town government act of February 21, 1873 (Stats. 1873, 74, Sec. 16), required the genuineness of all signatures to the petition therein provided for, and the qualifications of the subscribers thereto as the majority of the actual residents representing three-fifths of the taxable property of the town, to be established by affidavit: *Held*, that an affidavit stating that affiant "had examined the signatures," and that "the same represents three-fifths of the taxable property as well as a majority of the actual residents of said town to the best of his knowledge and belief," was insufficient and entirely ineffective.

Morgan v. Eureka County Commissioners

REQUIREMENTS OF AFFIDAVIT ON INFORMATION AND BELIEF TO ESTABLISH A FACT.

Where the law requires any fact to be established by affidavit, without prescribing its form, if made upon information and belief, it will be insufficient unless it states positively the facts and circumstances upon which such belief is founded.

TOWN GOVERNMENT ACT—SUFFICIENT PETITION AND AFFIDAVIT JURISDICTIONAL

FACTS. Under the town government act of February 21, 1873 (Stats. 1873, 74, Sec. 16), requiring a certain petition and affidavit to be filed before any of the powers conferred could be exercised: *Held*, that the filing of a sufficient petition and affidavit were jurisdictional facts; and that, in case of insufficiency of such petition or affidavit, there was not a mere irregularity but a total want of jurisdiction.

"BENEFICIAL INTEREST" TO SUSTAIN CERTIORARI AS TO PROCEEDINGS UNDER TOWN GOVERNMENT ACT. A tax-payer of the county and resident of a town, purporting to have been organized under the town government act of 1873 (Stats. 1873, 74), who has been sued for a license imposed by such town, has sufficient "beneficial interest" to maintain certiorari as to the proceedings of the county commissioners in establishing the government of such town.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

The plaintiff applied to the court below for a writ of certiorari, requiring D. H. Hall, E. E. Phillips, and L. W. Cromer, composing the board of county commissioners of Eureka County, to certify up the record of their proceedings in relation to the town of Eureka, in said county, and praying that such proceedings might be annulled and declared invalid. He set forth the filing of a petition on December 2, 1873, asking for the application to the town of Eureka of the provisions of the act of the legislature of February 21, 1873, providing for the government of towns and cities of the State; but alleged that it was not signed by a majority of the actual residents representing at least three-fifths of the taxable property of said town, and that neither the genuineness of all the signatures to said petition, nor the qualifications of the subscribers thereto, were

Morgan v. Eureka County Commissioners.

established by affidavit as required by law. He further set forth that the board of county commissioners, notwithstanding the insufficiency of the petition and affidavits, assumed to act thereon—established certain boundaries as those of the town of Eureka, and declared the same subject to the provisions of said act of the legislature; and he alleged such proceedings to be unauthorized by law, and that the commissioners thereby exceeded their jurisdiction. Plaintiff further set forth that he was an actual resident within said boundaries, and a tax-payer of said county; that he was carrying on business within said boundaries; that by the provisions of an ordinance, purporting to be passed by the government of said town, a license tax of \$340 a quarter had been imposed upon his business, and that upon his refusal to pay the same, an action to recover the same with the penalty prescribed had been commenced against him, and was still pending.

In accordance with the prayer of the petition the writ was issued, and the record of the proceedings referred to, including copies of the petition and affidavits, was certified up. The matter was heard in March, 1874, and resulted in a judgment annulling all the proceedings of the board of county commissioners in relation to the town of Eureka. The defendant appealed from the judgment.

The character of the affidavit is shown in the opinion.

George W. Baker, District Attorney, and *John F. Baker*, for Appellant.

I. Certiorari was not the proper remedy. Relator did not show in any way that he was beneficially interested or entitled to the writ; and on grounds of public policy and great public inconvenience it should have been refused. It is well settled that the inquiry in such a proceeding will not be extended further than to inquire if the inferior tribunal has

Morgan v. Eureka County Commissioners.

exceeded its jurisdiction, and no other question will be examined or determined. 2 Nev. 313; 5 Nev. 317; 6 Nev. 100; 8 Nev. 359. But in order to entitle any person to this remedy, it must appear that he has a particular beneficial interest in the matter sought to be reviewed; and no such interest has been shown here. That relator has been sued for license taxes and that the suit is still pending is unavailing for that purpose.

II. If the acts of defendants are void for want of jurisdiction, as they must appear to be to have them annulled in this proceeding, then relator can make a successful defense to the collection of taxes and to any action brought, for the plain reason that void proceedings can be attacked in any manner either directly or collaterally.

III. The record discloses the fact that action was taken in this matter by the commissioners on December 2, 1873, nearly four months prior to the institution of this proceeding. We may add that various ordinances were passed; a fire department established; deputy sheriffs to act as policemen appointed; debts contracted and responsibilities assumed for the payment thereof; licenses collected and disbursed, and many other business transactions done naturally incident to a municipal government. All this is swept away by this order; the fire department disbanded; the police force disorganized; unpaid demands left without a remedy for their collection; those who have paid licenses given a right of action back on the town for the money paid out by them; and all this in a town that comprises a large portion of the population of the county; and in a civil proceeding by one man; because he claims there was a technical defect in the organization! See *In re Santis*, 9 Mich. 324; *Rutland v. County Commissioners of Worcester*, 20 Pick. 71; *People v. Mayor, etc.*, 5 Barbour, 43; 21 Barbour, 656; *Ex parte Weston*, 11 Mass. 417; *Ex parte Adams*, 4 Pick. 25; *Royalton v. Fox*,

Morgan v. Eureka County Commissioners.

5 Ver. 458; *Wilbraham v. Commrs.*, 11 Pick. 322; 25 Maine, 69; 24 Ver. 288; 7 Mass. 394; 22 Ver. 131.

IV. If the affidavits were technically defective or not as full or positive as they might have been, that would not deprive the commissioners of jurisdiction; and the most that could be said would be that there was an irregular exercise of jurisdiction, and not a lack of it. Whether their action was founded upon strictly legal, or sufficient evidence, is not within the province of this Court to inquire on certiorari. See *Full v. Commissioners of Humboldt County*, 6 Nev. 100; *Hetzel v. Commissioners of Eureka Co.*, 8 Nev. 359; *Sherman v. Kelly*, 4 Smith, 355; 11 Mich. 353; 4 Hill, 598; 19 Cal. 150; 20 Wend. 145; 4 Denio, 120; 21 Barbour, 656; 21 Wend. 316; 36 Barbour, 177; 1 Denio, 537.

V. The very nature of the subject makes it utterly impossible for any person or number of persons to swear positively to the number of inhabitants or a majority of them, in any particular village or town. So it is likewise impossible to determine with accuracy what aliquot part of all the property any certain number of signatures represent. In the present case all was done that the legislature could have intended or required to be done, and at most the objections are purely technical, and should not be upheld to overthrow substantial justice and disturb substantial rights and liabilities. The commissioners must have had some discretion in the matter of passing on the sufficiency of the petition and affidavits, else their act would not be judicial. They did pass on the affidavits, and to their minds the requisite facts were established thereby; and all the authorities hold that if there was any evidence legally tending to establish those facts, the conclusion reached was conclusive, even on jurisdictional facts.

Morgan v. Eureka County Commissioners.

Thomas Wren and David E. Bailey, for Respondent.

I. In applying the provisions of the act of the legislature for the government of towns and cities in this State did the county commissioners exceed their jurisdiction? If they did, and the act was judicial, unquestionably certiorari was the proper remedy. To confer jurisdiction upon the commissioners under the act, it was necessary that a petition should be filed in the office of the county clerk, signed by a majority of the actual residents of the town or city to which the act was to be applied. The commissioners were to determine that a majority of actual residents had signed the petition, and that they represented three-fifths of the taxable property of the town or city. The act did not prescribe the mode of determining these facts, but as to the signatures and qualifications of the subscribers, it prescribed that they should be established by the affidavits of reliable tax-payers of said town or city, thus providing not only the mode of establishing them, but by whom they should be established. If there was a sufficient compliance with the law to give the commissioners jurisdiction their acts were legal, and that is an end to this case; if there was not a sufficient compliance with the law they exceeded their jurisdiction, and if the acts were of a judicial character, and there was no other plain, speedy, and adequate remedy, then this is the proper remedy.

II. The relator is beneficially interested. He not only shows that he is a tax-payer, which would be sufficient, but that his business can only be carried on by the payment of a heavy license imposed by the commissioners, and that a suit has been instituted against him, and is now pending to enforce its collection. This certainly lets him out of the list of mere ordinary tax-payers, and shows him very much interested.

Morgan v. Eureka County Commissioners.

III. Were the affidavits filed with the petition sufficient? We think they were defective, in several essentials. The affidavit of Sullivan was fatally defective, in not stating that he was a tax-payer of the town of Eureka. *State v. Commissioners of Washoe County*, 5 Nev. 317. All of the affidavits were fatally defective in not stating that all of the signatures were genuine, as the law required. The intention of the legislature, fairly to be gathered from the language used, evidently was to require proof by affidavit that each man, whose name appeared upon the petition, actually signed it. The affidavits were also to the best of the knowledge and belief of affiants, and their sources or means of knowledge or its extent, or whether they have any means of knowledge or any belief, are not stated. The law requires certain facts to be established by the affidavits of reliable tax-payers. Does it not require a higher order of proof to establish such facts, than such affidavits? See 3 N. Y. Code Rep. 142; *People ex rel. Blacksmith v. Tracy*, 1 Howard Pr. 186.

IV. The affidavits not being in compliance with the requirements of the law the commissioners did not acquire jurisdiction to act. *Steel v. Steel*, 1 Nev. 27; *Waitz v. Ormsby Co.*, 1 Nev. 370; *State v. Commissioners of Washoe Co.*, 5 Nev. 317.

By the Court, HAWLEY, J.:

The act providing for the government of the towns and cities of this State, approved February 21, 1873, provides that before any of the powers or jurisdiction conferred by the act can be exercised, "there shall have been filed in the clerk's office of the county in which the same is situated a written petition for the application of the provisions of this act to said town or city, signed by a majority of the actual residents of such town or city, representing at least three-fifths of the taxable property. The genuineness of all sig-

Morgan v. Eureka County Commissioners.

natures to such petition, and the qualifications of the subscribers, shall be established by the affidavits of reliable taxpayers of said town or city, filed with such petition." Stats. 1873, 74, Sec. 16.

A petition signed by six hundred and eighty-two persons was filed in the clerk's office of Eureka County, asking the board of county commissioners of said county to apply the provisions of said act to the town of Eureka, situate in said county. This petition was accompanied by the affidavits of J. D. Sullivan, T. J. Maupin, M. Borowsky and J. F. Ramsey. At a meeting held on the 2d day of December, 1873, the board passed an order declaring that the town of Eureka, from and after that date, was subject to the provisions of said act. Respondent claims that the affidavits are fatally defective and thereupon argues that in acting upon said petition and in passing said order the board exceeded its jurisdiction. The affidavit of Sullivan states "that he is a resident and tax-payer in Eureka County." The law requires that the affidavits shall be made by a tax-payer of the town or city. In order to give the board jurisdiction the affidavit must show that the party making it was one of the persons made competent by the law. "It should affirmatively appear that he is such person and he should also swear to the fact." *State v. The Board of County Commissioners of Washoe County*, 5 Nev. 320 and authorities there cited. In this respect the affidavit of Sullivan was fatally defective.

The other affidavits are not subject to this objection; but against them it is urged that they are defective; first, in failing to state that the signatures to the petition are genuine; second, that they are made upon information and belief. Each affiant states "that he has examined the signatures" upon the petition, "and the same represents three-fifths of the taxable property, as well as a majority of the actual residents of said town, to the best of his knowledge and belief." This statement does not establish the fact that said petition

Morgan v. Eureka County Commissioners.

is "signed by a majority of the actual residents," nor does it affirmatively establish "the genuineness of all signatures to such petition." It was the evident intention of the legislature that the facts should be established by the affidavits of reliable tax-payers acquainted with the facts. The affidavits filed with the petition state nothing explicit. In effect, they amount to nothing more than a statement under oath that affiants know nothing contrary to its truth. It was not intended that these affidavits should be a mere formal matter. An affidavit which states no fact within the knowledge of the person making it would be of but little weight in any legal proceeding. Such an affidavit does not establish any fact required by the law to be established; it makes no statement of facts upon which the minds of the commissioners could be informed, or upon which they could base a decision. We think, as a general rule, that when the law requires any fact to be established by an affidavit, without prescribing its form, if made upon "information and belief," it will be insufficient unless it states positively the facts and circumstances upon which such belief is founded. Such is the rule in regard to affidavits for attachments. *Cadwell v. Colgate*, 7 Barb. 255; *Deupree v. Eisenach*, 9 Geo. 598; *Campbell v. Hall*, McCahons (Kan.), 53; *Hellman v. Fowler*, 24 Ark. 235. So in proceedings to hold to bail. *Towers v. Kingston*, Browne (Penn.), 35; *Matter of Faulkner*, 4 Hill, 601; *Mosher v. The People*, 5 Barb. 578; *Blason v. Bruno*, 33 Barb. 521; *Adamson v. Wood*, 5 Black, 449; *Dyer v. Flint*, 21 Ill. 84; *Nelson et al. v. Cutter et al.*, 3 McLean, 329. And in numerous other cases. *Whitlock v. Roth*, Code R., Vol. 3 (N. Y.), 142; *The People v. Perrin*, 1 How. Pr. R. 76; *The People v. Tracy*, 1 How. Pr. R. 190; *Bridgeford v. Steamboat Elk*, 6 Mo. 357; *Table M. M. Co. v. Defeat M. Co.*, 4 Nev. 219; *State v. O'Flaherty*, 7 Nev. 157. This case does not come within any of the exceptions to this rule.

Morgan v. Eureka County Commissioners.

It may have been, as contended by appellant's counsel, utterly impossible for affiants to state positively the fact, under oath, that said petition was "signed by a majority of the actual residents of such town, * * representing at least three-fifths of the taxable property," until the boundaries of the town had been fixed by the board. It might further be urged that affiants were not invested with the ubiquity and the omniscience to know every man's signature, and be in possession of the exact amount of his taxable property. The law does not require impossibilities; but it does exact at least the impress of good faith and of probable cause. Every lawyer knows that affidavits are frequently made upon information and belief by men who really know nothing about the facts. Everybody knows that there is a well defined distinction between a positive affidavit and one founded merely on information and belief. If affiants knew the facts to be true, they should have so stated. If they knew nothing in regard to the facts they should not have made the affidavits. If they had no positive knowledge that the facts were true, but so believed from information, they should have stated their means of knowledge; given the nature and sources of their information, and stated in positive terms the facts and circumstances upon which their belief was founded. The petition and affidavits seem to have been framed with special reference to the evasion of the law instead of a compliance with it. The petition does not purport to be signed by residents or tax-payers of the town, and the affidavits state no facts in explicit or positive terms. They are radically defective in form and substance, and fail to establish any of the facts required by the law to be established before "any of the powers or jurisdiction" conferred by the act could be exercised. This is not a case, as claimed by appellant, of an irregular exercise of jurisdiction by the board; but a case where there is a total want of jurisdiction. The board had no authority to act until the jurisdic-

Roy v. Whitford.

tional facts were established as required by the law. If the law had left the question of the sufficiency of the petition to be determined by the board, without affidavits, then it would have been a case similar to that of *Hetzel v. The Commissioners of Eureka County*, 8 Nev. 359, where the sufficiency of the evidence upon which the board acted could not be inquired into by the writ of certiorari. The petition of respondent clearly shows that he was beneficially interested and entitled to the writ.

The judgment of the district court annulling the proceedings of the board is affirmed.

J. S. ROY *et al.* v. A. WHITFORD.

JURISDICTION OF JUSTICE OF THE PEACE OVER NON-RESIDENTS. Section 30 of the Practice Act, providing for service of summons upon non-resident defendants, applies to cases in justices' courts; but the precise method of acquiring jurisdiction prescribed by law must be pursued.

JURISDICTION OF JUSTICES—PRACTICE ACT, SECTIONS 511 AND 30. Sections 511 and 30 of the Practice Act are to be construed together as parts of the same statute relating to the same general subject of jurisdiction; the former being evidently intended to cover residents of the State, while the latter was intended to reach non-residents.

AFFIDAVIT FOR PUBLICATION OF SUMMONS. An affidavit for publication of summons against a non-resident defendant, which states legal conclusions instead of facts, is fatally defective.

ACTION OF JUSTICE WITHOUT JURISDICTION VOID—CERTIORARI. If a judgment be rendered by a justice of the peace in a case in which he has acquired no jurisdiction, his action is void; and, where there is no other plain, speedy and adequate remedy, it will be annulled on certiorari.

CERTIORARI before the Supreme Court. The defendant was justice of the peace of Genoa Township in Douglas County. It appeared that two suits were commenced in his

Roy v. Whitford.

court on June 11, 1874, against J. S. Roy and J. Coples, one by G. W. Gallanan for \$156, and the other by C. A. Decatur for \$230 75. At the time of commencing said suits, an affidavit was filed in each case as follows:

"Title of court and case.]

"STATE OF NEVADA, }
County of Douglas. } ss.

"G. Walter Gallanan, being duly sworn, deposes and says that, of his own knowledge, he knows the defendant now resides out of this State and in the State of California, and for the six years last past has resided in said California. That this is an action upon a contract for the payment of money. That affiant believes that service of summons cannot be speedily made upon defendants, if at all, personally, and asks for an order of this court that the summons in this cause be made by publication, posting or such other means as such court deems expedient and just to parties concerned.

"G. WALTER GALLANAN.

"Subscribed and sworn to before me this 11th day of June, 1874.

"A. WHITFORD, J. P."

Upon this affidavit the justice granted an application for an order to post summons, and appointed a person to make service by posting, and thereupon a certain paper in the form of a summons, and requiring defendants therein to appear on June 18, but not signed by the justice, was issued and copies thereof posted in three conspicuous places within the township. On June 18, no one appearing for defendants, on application of plaintiff therein judgment by default against defendants was rendered in each case.

Roy and Coples, the defendants in said cases, having obtained information of the rendition of such judgments after the time for appeal had expired, applied to this Court for a

Roy v. Whitford.

writ of certiorari, and the papers and proceedings of the justice in both cases were certified up.

D. W. Virgin, for Petitioners.

By the Court, WHITMAN, C. J. :

The petitioners seek to review the action of defendant, a justice of the peace, by certiorari, time for appeal having lapsed without their fault. They are non-residents of the State of Nevada, and were sued in Genoa Township, Douglas County. This action, it is claimed, was beyond the jurisdiction of the justice, as defined by section 511 of the Practice Act. The evident purpose of the section cited is to cover residents of the State; while the equally evident purpose of section 30 is to reach non-residents. Construing these sections together, as parts of the same statute relating to the same general subject of jurisdiction, it follows that the legislative intent clearly was to give to justices the jurisdiction attempted to be exercised in this case. This might be legally done, as it is the duty of the legislature to fix by law the powers, duties and responsibilities of justices of the peace; and it is only upon the performance of such duty that the justices' courts are vitalized; and whatever power they thus obtain, it is their privilege to use, provided always it does not conflict with the constitutional restrictions upon the legislature in this regard. Here there is no such conflict; consequently defendant might have properly exercised the power as attempted, had he pursued the method prescribed by statute in lieu of personal service upon non-residents of the State. In this he signally failed. If there is any step in the proceedings not null it has escaped attention. Suffice it to say that the affidavit is totally defective in that it offers legal conclusions instead of facts for the consideration of the justice; that no summons was issued, so no foundation for

Buckley v. Buckley.

service either by ordinary or extraordinary means, and so on to the end. These objections are fatal to the judgments under review. *Little v. Currie*; 5 Nev. 90.

As the justice acquired no jurisdiction in the premises, all his acts are void; wherefore it is ordered that they be annulled.

SYLVANUS BUCKLEY, APPELLANT, v. ARMINA BUCKLEY, ADMINISTRATRIX OF THE ESTATE OF HENRY A. BUCKLEY, DECEASED, RESPONDENT.

REPLEVIN OF GOODS IN HANDS OF PLAINTIFF IN OTHER REPLEVIN. Where personal property in the hands of the plaintiff in a suit of claim and delivery is claimed by a third person, the latter is not obliged to intervene in the pending action but may institute an original action of claim and delivery.

WHEN REPLEVIN LIES. As a general principle the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it is in the custody of the law or unless it has been taken by replevin from him by the party in possession.

CONTRACT VOID UNDER STATUTE OF FRAUDS. Where the condition precedent of a contract is the delivery and reception of chattels to be kept for two years, and there is no written agreement, the contract is void under the statute of frauds.

DESCRIPTION OF PROPERTY IN REPLEVIN. In replevin the description of the property must be so clear that an officer can identify it.

CHARGING A FACT, ERROR—EXTENT OF RECOVERY IN REPLEVIN. Where in a replevin case for a band of sheep, the description of which was vague though some were described and all stated to be of the value of three dollars per head, the court charged that there was nothing in the description to distinguish one sheep or class of sheep from another and that plaintiff must recover all or none: *Held*, erroneous both as involving a question of fact and as not clearly stating the law.

APPEAL from the District Court of the Second Judicial District, Washoe County.

Buckley v. Buckley.

This was an action to recover twenty-three hundred and seventy head of sheep, of the value of seventy-one hundred and ten dollars, at the rate of three dollars per head. The complaint set forth that these sheep had been in the possession of Henry A. Buckley, deceased, and by him delivered to George Montgomery and William H. Short of Washoe Valley; and that they were afterwards, in October, 1873, taken by process of law from said Montgomery and Short by defendant as the administratrix of said H. A. Buckley, deceased. Plaintiff claimed to be the owner of them, and upon filing an affidavit and undertaking in the usual form on claim and delivery of property, acquired possession of them from defendant.

The defendant, in her answer, set up as a defense that she as such administratrix had commenced a suit in the same court against Montgomery and Short for the recovery of the same sheep; that such suit was still pending; that under an affidavit and undertaking upon claim and delivery of personal property she had acquired the possession thereof from Montgomery and Short, and that she held them subject to the orders of the court in said action, and to return them to Montgomery and Short if a return should be adjudged. To this plea the plaintiff put in a demurrer, which was overruled. The case then came up for trial before a jury, and the court held as it had held upon overruling the demurrer, that the defense was good, and, upon the verdict finding the value of the sheep, rendered judgment for the defendant for the return thereof with their increase and interest on their value from the time of taking, or for their value in case a return could not be had and for costs. The evidence, upon the trial, showed that the plaintiff was the father of H. A. Buckley, deceased, the defendant's intestate. There was also evidence showing or tending to show that in 1869 a verbal contract was made between the plaintiff and his son, who

Buckley v. Buckley.

were both at that time living in Merced County, California, by which the son received from the father thirteen hundred breeding ewes on shares, to be kept two years, the wool to be divided at shearing time and the lambs in the fall of each year; that at the end of the two years the original band was to be returned, and that in 1871, the son, having up to that only partially fulfilled the conditions of the contract, moved the sheep into Washoe County in this State. To this evidence of a contract defendant objected and moved to strike it out on the ground that the contract testified to was not to be performed within one year from the making of it, and was therefore void. The court sustained the objection, but allowed the evidence to stand for the sole purpose, as stated to the jury, of explaining the manner in which the deceased came into the possession of them.

In charging the jury, the court, among other things, said: "There is nothing in the description by which one animal of the flock or any one class of animals comprising in part the flock can be distinguished from other or others. The recovery, if any, under the pleadings must be for the flock described as an entirety, or else no recovery can be allowed at all to the plaintiff either upon the pleadings or any testimony introduced upon the trial; that is, the recovery must be for the entire flock and not for any mere part of the same. When personal property, sought to be recovered in an action in the nature of replevin consists of an assigned number of individual parts in the aggregate merely, without any description of the individual parts of the aggregate, the recovery must be for the aggregate as alleged, or there can be no recovery at all."

The judgment having been, as before stated, in favor of defendant, plaintiff moved for a new trial, which was refused; and he then appealed from the judgment and order.

Buckley v. Buckley.

Webster & Knox, for Appellant.

I. The affirmative matter set up in the answer of defendant, and proof of which was allowed upon the trial, constitutes no defense to this action. Montgomery and Short, the persons alleged to be defendants in an action brought against them by the defendant in this action for the recovery of the property in controversy, are strangers to plaintiff; and an action against them by defendant, though for the same property, cannot affect the rights of plaintiff. As to him, those proceedings are *res inter alios*, and cannot affect his rights or his remedies.

II. The rule that property in custody of the law cannot be taken in replevin refers to cases where the defendant in execution brought replevin against the officer. It does not apply to the case of a stranger to the execution. 15 Johns. 401; *Clark v. Skinner*, 20 Johns. 470; *Thompson v. Bulton*, 14 Johns. 84; *Portland Bank v. Stubbs*, 6 Mass. 427; *Baker v. Fales*, 16 Mass. 146; *Stone v. Wilson*, Wright, 157; *Illsley v. Stubb*, 5 Mass. 334.

III. In the case at bar the property was not taken from the possession of the sheriff, but from that of the plaintiff in the action against Montgomery and Short, and it was not in the custody of the law. The remedy by intervention was not the proper one on the part of plaintiff. He had no interest in the result of the action against Montgomery and Short. But that remedy at any rate, instead of being exclusive of any other, is optional with the party whose interests are involved.

IV. The court, in its charge, assumed to decide questions of fact which are exclusively for the jury. It erred also in stating in effect that plaintiff must recover the whole number of sheep sued for or none.

Buckley v. Buckley.

Haydon & Cain and Wm. Boardman, for Respondent.

I. The defendant under an affidavit and undertaking for the claim and delivery of personal property acquired the possession of the sheep from Montgomery and Short, and now holds them subject to the orders and judgment of the court in said cause, and to return the same to Montgomery and Short if a return should be adjudged by the court. Plaintiff claims that he can take them from her possession, and relies upon *Illsley v. Stubbs*, 5 Mass. 280, decided in 1809. We submit, on the contrary, the elaborate argument of counsel and decision of the supreme court of California upon the same proposition here involved, and upon a statute almost exactly like ours in the case of *Hunt v. Robinson*, 11 Cal. 262. The entire ground is there gone over, and references made to decisions of other states in support of our position, that where a bond for the return of property taken is given and the property delivered to the claimant, it is still in the custody of the law, as much so as if the sheriff still held possession of it—the custodian alone being changed. It is plain that if the property so held should be adjudged liable to the claims of a third person, a levy upon it at the suit of such third person would occasion the forfeiture of the condition of the bond given by the original. Such a result would be repugnant to equity. The property was in fact, when placed in the possession of the defendant upon her giving the bond required by law, not withdrawn from the custody of the law, but she instead of the sheriff was made its custodian, and in her hands, as such custodian, it was as free from the reach of other process as it could have been in the hands of the sheriff. *Revis v. Welbourne*, 6 Ala. 49; Practice Act, Secs. 102, 104; *McRae v. McLean*, 3 Porter, 138; *Evans v. Kurtz*, 7 Missouri, 411; *Acker v. White*, 25 Wendell, 611.

Buckley v. Buckley.

II. A surety on a delivery bond may exonerate himself therefrom by delivering the property to the sheriff at any time before judgment is rendered against him on the bond; and having contracted and covenanted to return it, he cannot be deprived of this right by a stranger. Drake on Attachment, Sec. 335; *Reager v. Kitchen*, 1, 2, 3 Martin, 588; *Hanford v. Perrier*, 6 B. Monroe, 595.

III. The exclusion of evidence of the alleged contract was proper. Such contract was parol and not to be completely performed within a year, not in fact till the expiration of two years from the time of making thereof; and for that reason it was within the statute of frauds and void. 3 Parsons on Con. 36 and note; *Lockwood v. Barnes*, 3 Hill, 128.

IV. The agreement alleged by plaintiff constituted defendant's intestate a tenant in common with plaintiff on the increase of the sheep. *Knox v. Marshall*, 19 Cal. 617; *Bernal v. Hovious*, 17 Cal. 541; *Putnam v. Wise*, 7 Hill, 234; 4 Wend. 525; 15 Barb. 333. If tenants in common of a part of the sheep, no action of replevin or to obtain possession lay in favor of plaintiff. Morris on Replevin, 113; Story on Part. Sec. 414; *Gilbert v. Dickson*, 7 Wend. 449; *Farr v. Smith*, 9 Wend. 338.

V. There is no description in the complaint whereby the original band or any of it could be distinguished from the increase, nor from any others that were mingled with the original band.

VI. If plaintiff had any right, intervention in the original suit was clearly his remedy. His claim was a right to the property which was the subject of litigation, and he could have claimed damages for its detention as well against the plaintiff as the defendants in that suit. His right to intervene was clear. Practice Act, Secs. 598, 599, 600, 601, 602; *Horn v. Volcano Water Company*, 13 Cal. 70.

Buckley v. Buckley.

By the Court, WHITMAN, C. J. :

To the complaint in this action to recover a band of sheep, respondent pleaded in bar a certain suit pending between herself and Montgomery and Short for the recovery of the same property; and that she held the same by virtue of claim made as by statute provided. These facts being proved, the district court held the defense good; and that the property was virtually in the custody of the law, and that appellant should have intervened in the action so proven to exist. Admitting a right to intervene, still that is not exclusive; so the main question is, was the property in the custody of the law?

In a very well considered case, applicable to this, Parsons, C. J., clearly expresses the view herein adopted thus: "It is true that anciently, replevin was generally sued out to replevy cattle taken by distress as a pledge; but in fact, replevin lies for him who has the general or special property in chattels, against him who has wrongfully taken them. But chattels in the custody of the law cannot at common law be replevied, as goods taken by distress upon a conviction before a justice, or goods taken in execution; and by parity of reason, goods attached by an original writ, as security for the judgment, cannot be replevied. But if the goods are wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover, against the officer. For the common law would not grant process to take from an officer chattels which he had taken by legal process already issued. But the common law has, in this respect, been altered by the statute of 1789, c. 26, sec. 4. This statute authorizes the suing of a writ of replevin against the officer, for chattels which he has attached or seized in execution, provided the plaintiff in replevin be not the debtor. This alteration of the common law has been productive of much practical inconvenience; but it must rest

Buckley v. Buckley.

with the wisdom of the legislature to decide whether the common law, in this respect, should or should not be restored. As a general principle, the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it is in the custody of the law, or unless it has been taken by replevin from him by the party in possession. The plea, in this case, does not allege any property in Stubbs; but it alleges that the goods were delivered to him by the officer, in obedience to a replevin sued by Stubbs, not against the plaintiffs but against Lund. Stubbs' possession was, therefore, so far legal against Lund, that he could not recover them back again by another replevin, but only on a *retorno habendo*, if he should prevail against Stubbs.

"But Stubbs cannot by his own writ acquire any right of possession against the plaintiffs, who were not parties to it. They could not plead to Stubbs' writ, nor could an *retorno habendo* be awarded them. If Stubbs should recover judgment against Lund, certainly that judgment could not bar the plaintiffs from suing a replevin against Stubbs; and it cannot be admitted that the mere producing of his writ can more effectually protect him against the plaintiff's suit, than a judgment in his favor could. But the defendant has urged in support of his plea, that if the plaintiffs should recover on this writ, he cannot make restitution to Lund, if this latter should recover. This is true; but this argument cannot avail Stubbs. If he should recover against Lund, the objection fails; and if he should not, it is his fault to have sued a replevin against Lund, without any legal cause of action. The court cannot decide that the allegations of the plea are sufficient to abate the writ, without also deciding that the owner of chattels taken from him by a trespasser, finding them in the possession of a stranger, who has taken them by replevin from the trespasser, cannot maintain replevin against the stranger. But the law will not authorize such a decision; for no transaction between

Buckley v. Buckley.

the stranger and the trespasser can bind the right of the owner." *Ilsley et al. v. Stubbs*, 5 Mass. 280; *Hagan v. Duell et al.*, 24 Ark. 26.

If this holding operate harshly against respondent, it is her own fault; but surely one having the right of possession to property, cannot be expected to stand by while strangers wrangle over it, subject as it must be to all the contingencies of loss, which practically surround personal property in litigation. The case must go back for a new trial, and for that reason it is proper to note some other claims of error, the decision of which should affect the retrial. Proof of a contract between appellant and respondent's intestate was excluded, (except for a special purpose,) against the former's exception. The ruling was correct; the condition precedent of the contract was the delivery and reception of thirteen hundred sheep to be kept for two years; and there was no written agreement; so the contract was void under the statute. Comp. Laws, Sec. 289. But the ruling could not possibly have hurt appellant; as, the contract being held valid, he could not have recovered at most more than the original number delivered, in the form of the present action; while there being no contract, he would be entitled to the present possession of the whole or a major portion of the band described, provided always the jury believed his witnesses, to the exclusion of the testimony tending to prove a gift from him to respondent's intestate.

The court erred in charging the jury that appellant must recover all or none; because such instructions involved a question of fact, and did not clearly state the law. Of course, in a case like the present, a description must be so clear that an officer can find the property; and in one view this description is not so clear; as with the exception of the specification of forty head of bucks, it is general, of a band without giving brands, age, sex, or any other clew for the distinction of one sheep from the other. But there was evi-

Birchfield v. Harris.

dence tending to elucidate this general description; and then the complaint, by the statement that the value of the sheep was three dollars per head, put them all on the same plane; which assumption was recognized by the answer; so to neither party, according to the pleadings, and there is nothing in the evidence contradictory, could it make any difference whether one sheep or another was taken or kept. Undoubtedly, had appellant proved his right to one hundred sheep and waived a return, he could, as the pleadings and evidence stood, have recovered three hundred dollars. Why not then, there being no such waiver, the one hundred sheep; each of such sheep being the exact equivalent of every other in the band? To avoid any complication, however, appellant may desire to amend his description, in which case he should be allowed to do so. The case is eminently one for friendly settlement, rather than for hostile litigation; but that is beside this opinion. All this Court can do is to point out, as has been attempted, the legal road to the rights of the separate parties.

The judgment and order appealed from are reversed, and the cause remanded.

MARTHA BIRCHFIELD v. C. N. HARRIS, JUDGE OF
DISTRICT COURT OF SECOND JUDICIAL DISTRICT.

ORDER ON PROCEEDINGS AGAINST GARNISHEE NOT REVIEWABLE ON CERTIORARI

Where a district judge, in proceedings under section 131 of the Practice Act, made an order requiring a garnishee to deliver to the sheriff moneys in her hands claimed to belong to the attachment debtor: *Held*, that as the statute conferred upon the judge full jurisdiction over person and subject matter, his order, however erroneous, could not be reviewed on certiorari.

This was an original proceeding in the Supreme Court. The petitioner prayed for a writ of certiorari against the

Birchfield v. Harris.

Hon. C. N. Harris, judge of the District Court of the Second Judicial District in and for the County of Ormsby. She set forth in her affidavit that on August 8, 1874, Augustine W. Pray commenced an action in the Second District Court against William A. Quigle to recover the sum of \$3,491 22; that a writ of attachment was issued in said action, and certain property of said Quigle levied upon in pursuance of said writ; that afterwards, in pursuance of sections 130 and 131 of the Practice Act, said Quigle was cited to appear before Judge Harris to be examined respecting his property, and at the same time said petitioner was cited to be examined respecting any property belonging to said Quigle in her possession; that pursuant to said order petitioner appeared before said judge and stated that the property sought to be taken from her possession was the sum of six hundred dollars in gold coin, and was her exclusive property; that she was a widow, and the mother of said Quigle and wholly dependent upon him for her support; and that said money had been given to her for her maintenance and support by her said son; that thereupon said judge made the order complained of and compelled her to deliver over said money to the sheriff, to be applied to the satisfaction of any judgment said Pray might obtain against said Quigle; and that said judge, as petitioner was informed and believed, had no jurisdiction or authority to make such order.

In pursuance of the petition a writ was issued and the proceedings of the judge below certified up. The order complained of was entitled in the action of Augustine W. Pray v. W. A. Quigle, and read as follows:

“The defendant in the above entitled cause having been cited to appear before me to answer under oath concerning his property, in pursuance of the 131st section of the Civil Practice Act of this State; and his mother, Mrs. Martha Birchfield, having also been cited to appear in the same proceeding to answer in like manner respecting property or

Birchfield v. Harris.

money of said defendant in her possession or under her control; and said defendant having disclosed by his answers under oath that he gave his said mother, since this suit was begun, the sum of six hundred dollars in gold coin, and she, said Mrs. Martha Birchfield, having answered under oath in said proceeding that she had received from said defendant, her son, said sum of money on the 10th day of August, 1874, not in payment of any debt but as a gift for her benefit and support, and it appearing from the testimony of the plaintiff in this proceeding this day given that said defendant refused on the 7th day of August, 1874, to apply said money to the payment of his debts on the ground that he was in a bankrupt condition and did not intend to leave himself without money; and it appearing to my mind *prima facie*, by the evidence that said money is the property of the defendant Quigle: it is ordered that said Mrs. Martha Birchfield deliver to S. T. Swift, the sheriff of Ormsby County, Nevada, the sum of six hundred (\$600) dollars gold coin, to be by him applied so far as necessary to the payment of any judgment, which the plaintiff may obtain in said cause, or to said Mrs. Martha Birchfield, if plaintiff do not obtain any judgment, or any excess thereof, after payment in full of any judgment so obtained by plaintiff in said cause, *unless* said Mrs. Martha Birchfield shall have instituted proper legal proceedings to assert and show legal claim and title to said money within ten days after service upon her of this order and delivery thereunder of said money to said sheriff.

“C. N. HARRIS,

“District Judge.

“CARSON, August 14th, 1874.”

Robert M. Clarke, for Petitioner.

Counsel cited the following authorities: Drake on Attachments, Secs. 651 to 659; 7 Humphrey, 112; 2 Mass. 96; 4

Birchfield v. Harris.

Mass. 85; 18 Me. 187; 22 Me. 28; 1 Sumner C. C. 537; 4 Mason C. C. 460; 5 N. H. 178; 59 Penn. 361; 8 Pick. 67.

Thomas Wells, for Defendant.

I. The judge did not exceed the authority given him by section 131 of the Practice Act. He made the order "on such terms as" he thought were "just." He did not exceed his jurisdiction by attempting to pass judicially and finally on the question of title to the money in question; he could not do that, nor can this Court do so in this proceeding. The order is merely provisional, precautionary, and not final; it is ancillary to the suit at law. It is no bar to an action, in the proper form and proper forum, to assert the legal title of the plaintiff to the money—an action wherein the court could adjudge whose the money is, and decree delivery accordingly. The proceeding is to find out if there be *prima facie* a claim upon the garnishee, which is to be ascertained from all the evidence. The evidence here shows fraud on the part of the debtor and his ownership of the money. 9 Cal. 262; 26 Cal. 586; Drake on Attachment, Secs. 651 to 659, inclusive.

II. If the garnishee in this case had been discharged, because she asserted title to the funds, by gift from the defendant in attachment, the door to fraud, in every instance of a debtor being in a failing condition, and wishing to defraud, would be effectually open, and this remedial provision of the statute rendered practically unavailing.

By the Court, WHITMAN, C. J.:

Under the title "attachment" the Practice Act of this State provides that "Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defend-

Birchfield v. Harris.

ant, may be required to attend before the court, or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof." Comp. Laws, Sec. 1192.

In the case of *Pray v. Quigle*, under such section, Quigle and the petitioner were examined, and thereupon the judge made an order, which the petitioner seeks to review on certiorari. As the judge acted with full jurisdiction of person and subject matter, it is immaterial how erroneous the order, it cannot be reviewed in this proceeding. *Hetzel v. Commissioners of Eureka County*, 8 Nev. 359.

Let the writ be dismissed.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

OCTOBER TERM, 1874.

WILLIAM HASSETT, RESPONDENT, v. J. H. WALLS,
APPELLANT.

ROAD TAX OF 1873 UNCONSTITUTIONAL. The highway act of 1873, in so far as it provides for a road tax upon individuals, (Comp. Laws, 3927) is obnoxious to the constitutional provision relating to poll taxes, (Const. Art. II. Sec. 7) and is void.

ROAD SERVICE A TAX. The levy of service upon an individual for road purposes is an emanation from the taxing power.

ROAD TAX OF 1873 A POLL-TAX. The road tax of four dollars annually, or two days' labor, imposed upon individuals by the highway act of 1873, (Comp. Laws, 3927,) whether regarded as a levy in money or service, is a capitation or poll-tax.

ONLY ONE CONSTITUTIONAL POLL-TAX. As the constitution prescribes specifically what poll-tax may be levied (Art. II., Sec. 7), such indication excludes from legislative power any other.

APPEAL from the District Court of the Sixth Judicial District, Eureka County.

This was an action originally commenced in the justice's court in Eureka Township, Eureka County, by the plaintiff against the Eureka Consolidated Mining Company for a balance of four dollars. The company filed an affidavit admit-

Hassett v. Walls.

ting that the sum sued for was a balance for work performed by plaintiff in July, 1874; but setting up that the sum was claimed by J. H. Walls, road supervisor of the county, who had attached it as road tax imposed upon plaintiff; and praying to be allowed to pay it into court. The court thereupon, in accordance with section 598 of the Practice Act, admitted Walls to be substituted as defendant in the place of the company; and he filed an answer, setting up his claim to the money as such road supervisor. A question of the legality of such a tax being raised, the case was on motion, certified into the district court for trial. The cause having been there tried, the court found that the money was claimed by defendant as a road tax levied by section 9 of "An act in relation to public highways," approved March 5, 1873; that it was a poll-tax, and that as such it was repugnant to the provisions of the constitution. Upon the findings judgment was rendered for plaintiff. Defendant appealed from the judgment.

Hillhouse & Davenport and Geo. W. Baker, for Appellant.

I. The constitutional clause relating to poll-tax (Art. II., Sec. 7) comes under the head of and is a part of the provisions relating to the "Right of Suffrage." These provisions come before the distribution of powers and only limit the power of the legislature so far as restricting the "right of suffrage," and is not at all any limitation upon the general power of taxation vested in the sovereign. If this view be untenable, still the constitutional provision, properly construed, means only a tax for the purpose of state and county revenue; and no restriction is placed upon the legislative power to levy other per capita or poll-taxes for other purposes.

II. The Highway Act is only intended to apply to road districts to be created, is only special, in the nature of a

Hussett v. Walls.

local tax for improvement of the roads within the road district; therefore the tax imposed cannot be the same general poll-tax, mentioned in the constitution; because there the poll-tax must be general and appropriated to particular uses, none of which is to improve roads in any manner.

III. The act in relation to public highways gives each person the right to work on the road, in lieu of payment. It is the same as if it had provided that each inhabitant should perform so much work, or in default pay a certain sum.

IV. As a general statute, exempting certain property from taxation, does not exempt it from assessment or local taxation for local improvement, it cannot be contended that a restriction in the constitution on general poll-tax can be a restriction on the power to levy poll or per capita tax or assessment for purposes of local improvements. The tax imposed by the act under consideration is a tax for local improvements.

V. In Illinois it has been held that a law, requiring work upon roads or on failure that money should be paid, is valid; and in 29 Ill. 490, it is decided that such a burden is not a tax within the meaning of the word as generally used. See also *Sawyer v. City of Alton*, 3 Scam. 127. If these decisions be correct the sum fixed by our law is not a per capita tax, but is only an amount the inhabitant can pay in lieu of work upon roads. The Illinois cases also hold that the legislature can require work on roads under the same principle that it requires military or jury service.

VI. A state legislature is supreme as to the power of taxation, limited only so far as restricted by the constitution. 13 Cal. 334; 41 Cal. 530; 35 Cal. 632; 2 Neb. 501; 17 Wis. 684; 29 Wis. 674; 17 Cal. 24.

Hassett v. Walls.

Thomas Wren and Bailey & Cole, for Respondent.

I. The constitution prescribes two important restrictions upon the power of the legislature; first, that it shall not levy an annual poll-tax exceeding four dollars for any purpose; and, second, that the money collected from said tax shall be equally distributed between the State and the respective counties of the State. In other words, the constitution limits the amount of the poll-tax to be levied and provides for the modes of its distribution; and if the legislature moves out of the orbit prescribed by the constitution its acts are null and void. Smith on Const. Law, 571.

II. The revenue law, (Comp. Laws, 3166,) levies an annual poll-tax for the use of the State and county of four dollars, * * * being the maximum amount allowed under the constitution, and for the purposes for which the constitution provides it shall be levied. We claim that any other poll-tax, such as the one attempted to be levied by the highway act, being an additional poll-tax is unconstitutional.

III. This road tax is a poll-tax. "A poll-tax is a sum of money levied on each poll." Bouvier's Law Dict. 349. This is just what the road tax is, with the addition that it is to be enforced by the most summary and arbitrary proceedings ever known in a free state—the provision being that the property of third parties, as well as that of persons liable for the tax, may be seized by the road supervisor and sold on verbal notice of an hour. It is true that there is a proviso that persons may work two days in lieu of paying the tax; but this proviso was placed in the law to take effect only after the levy has been made, and is merely an attempt to cover up an unconstitutional act of the legislature with an immaterial provision, which was never intended to be acted upon.

IV. The maximum amount having already been levied in accordance with the constitutional provision, the levy of an

Hassett v. Walls.

additional poll-tax of four dollars for road purposes is an attempt to impose an annual poll-tax of eight dollars. It might be contended that the road law having been passed subsequent to the revenue law repeals that portion of the latter in relation to poll-taxes, but it will be noticed that the road law devotes tax to a purpose not authorized by the constitution; consequently it is invalid.

V. Appellant contends that, inasmuch as the constitution not only provides the amount of poll-tax to be levied but also provides for its disposition, the legislature is not restrained from levying an additional poll-tax for other purposes. Instead of adhering to the legal maxim that the naming of one thing is the exclusion of the other, appellant virtually contends that the naming of one thing includes everything else; and that therefore, though the legislature can only levy a poll-tax of four dollars for State and county purposes, it can levy another poll-tax of four dollars tax for road purposes. This kind of constitutional construction will not bear scrutiny.

VI. Appellant further contends that this road tax is only for local improvements and not a general tax. But it makes no difference what it is for; because neither the legislature could levy, nor could it authorize a municipal corporation to levy, a poll-tax for local improvements, after the State had already levied one.

VII. The cases cited from Illinois are not applicable because they hold that "an assessment of labor for road repairs is not a poll-tax," which is not the case at bar. In that state no tax per capita is levied as is done in the road law of this State, but an assessment of labor is levied. Besides this, the reasoning in the Illinois cases is very unsatisfactory and the conclusions lame and impotent.

Hassett v. Walls.

By the Court, WHITMAN, C. J.:

By the general revenue law of this State, an annual poll-tax of four dollars is levied upon "each male resident, over twenty-one and under sixty years of age (uncivilized American Indians excepted,) and not by law exempt, for the use of the State and county." Comp. Laws, Sec. 3166. By the Highway Act of 1873, it is provided that "each able-bodied male resident of any road district of this State, over twenty-one and under sixty years of age (uncivilized American Indians excepted,) and not exempt by law, shall pay an annual road tax, for the use and benefit of said road district, of four dollars; * * * provided if any person liable to pay road tax, as herein provided, will perform or cause to be performed two days' work, * * such labor shall be received in full satisfaction of said four dollars." Comp. Laws, Sec. 3927.

This action is brought in resistance of the clause last quoted; respondent claiming that it is obnoxious to the following provision of the constitution of the State, in that it levies a double poll-tax and disposes improperly of the proceeds. Says the constitution: "The legislature shall provide by law for the payment of an annual poll-tax of not less than two nor exceeding four dollars from each male person resident in the State between the ages of twenty-one and sixty years (uncivilized American Indians excepted,) one-half to be applied for State and one-half for county purposes. * * *" Art. II, Sec. 7. The otherwise plenary power of the legislature, as to poll-tax, is evidently limited by this language; and no more than four dollars may be lawfully levied on any person for any one year, and that must be divided equally between county and State. So if the Highway Act levies a poll-tax, it must fall.

Appellant argues that the object of the law is rather a requisition of service than a poll-tax. The letter of the

Hassett v. Walls.

act is rather against this position; but waiving that and admitting the object to be as claimed, appellant's position is not bettered. Taxation may be levied in money, service, or in kind; it is no less a tax. *The People v. The Mayor of Brooklyn*, 4 Cow. 419. Nor is the levy of service on a road analogous to the demand of military or jury duty. The former is an emanation from the taxing power; the latter two the necessary exercise of legislative power in preservation of reserved popular rights touching the person, as the user of the right of eminent domain does the property of the citizen. To themselves the people have reserved the right to bear arms in a well regulated militia, and also the right of trial by jury. Upon the legislature devolves the duty to maintain those rights; and although for some minutiae of that maintaining taxation may be necessary, yet demand for service is no portion of such taxation—that springs from a different source of power.

In Illinois, road, jury, and military duty are placed upon the same plane; and it is held that neither is in the nature of a tax. *Sawyer v. The City of Allon*, 3 Scam. 127; *Town of Pleasant v. Kost*, 29 Ill. 490; *Fox v. City of Rockford*, 38 Ill. 451.

But a contrary rule, as before indicated, appears so clearly correct that these authorities will not be followed. Were the law of this State like that of Illinois, which requires labor and allows it to be commuted into money, while Nevada levies a money tax but allows commutation in labor, the conclusion would be the same. Either is, and both are, capitation or poll-taxes; one in money, the other in service, but both in excess of the limitation imposed upon the legislature; if in money, both in amount and in the disposition made of the proceeds; if in service, because no other poll-tax than the one prescribed by the constitution may lawfully

State v. Murphy.

be levied. The indication of this one has excluded from legislative power any other.

So it follows that the portion of the highway act cited is unconstitutional and void; and the judgment of the district court so holding is affirmed.

THE STATE OF NEVADA, RESPONDENT, v. JOHN MURPHY, APPELLANT.

CRIMINAL LAW—SUPPLYING PROOF OF VENUE AFTER PROSECUTION RESTS.

Where in a criminal case after the prosecution rested defendant moved for his discharge on the ground that there had been no proof of venue; and the court thereupon allowed the State to call a witness and prove a venue *Held*, eminently proper.

MURDER—PROOF BY EXPERTS OF MORTAL CHARACTER OF WOUND NOT INDISPENSABLE.

In a murder case, when the proof was that deceased was a strong and apparently healthy man; that he was wounded by a pistol shot fired by defendant; that he immediately took to his bed; suffered intensely for two days and then died; and it was objected there was no proof by experts that the wound was dangerous or mortal or caused the death: *Held*, that the evidence of experts was not indispensable and that the proof as it stood was sufficient to go to the jury and, in the absence of showing to the contrary, justified a verdict against defendant.

DYING DECLARATIONS, WHAT ARE ADMISSIBLE. Dying declarations, which may properly be admitted, are such as touch upon the cause of, or circumstances surrounding, the approaching death.

OBJECTION OF "HEARSAY" TO DYING DECLARATIONS NOT AVAILABLE. A general objection to the introduction of dying declarations that they are hearsay, is not available, as all evidence of dying declarations must necessarily be hearsay.

FOUNDATION FOR INTRODUCTION OF DYING DECLARATIONS. It is sufficient foundation for the introduction of dying declarations to show that at the time of making them he was in expectation of death from the effects of his wound.

OBJECTIONS TO EVIDENCE SHOULD STATE POINT OF EXCEPTION. Where in a murder case a witness was asked to testify as to the dying declarations of deceased; and it was objected to such proposed evidence that it was hear-

State v. Murphy.

say and that no proper foundation had been laid: *Held*, that the objection was not specific enough to cover the point that the declarations did not touch the cause of, or circumstances surrounding, the approaching death.

NO ERROR IN ADMISSION OF UNPREJUDICIAL TESTIMONY, THOUGH IRRELEVANT. Where in a murder case testimony was admitted as to what purported to be dying declarations; but it also appeared in proof that defendant had made a confession which warranted a conviction: *Held*, that though the declarations may have been irrelevant, the testimony could not have prejudiced defendant.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

Defendant was indicted for the murder of John K. McCallum by shooting him with a pistol on May 12, 1874, at Carson City in Ormsby County. He was tried in August and convicted of murder in the first degree, and sentenced to be hanged. He appealed from the judgment.

At the trial, after the prosecution had rested, counsel for defendant moved for the discharge of the prisoner upon the grounds—

“First, that there is no evidence in the record proving that the crime had been committed within the County of Ormsby and State of Nevada, or within the jurisdiction of this court;

“Second, that it is not shown by any expert that the wound was dangerous or mortal, or that the death of the deceased was caused by the wound.”

The court overruled the motion on the second point, and on the first granted leave to the State to supply the proof of venue; and a witness was thereupon called who testified that the shooting was done in Carson City, as alleged in the indictment.

In the course of the examination of Thomas Wells, a witness for the prosecution, it appeared that deceased on the day before his death and in the expectation of speedy

State v. Murphy.

dissolution (saying he had given up all hopes of recovery and knew he would die from the effects of his wound) made certain statements or declarations. Witness was asked to repeat them. Defendant objected on the ground that the proposed testimony, if any such statements were made, was hearsay and that the proper foundation for such testimony had not been laid. The objections were overruled and defendant excepted. Witness then testified:

“He [deceased] then told me that on the last Saturday previous to the shooting, at a wood camp up in the mountains in the vicinity of Spooner’s Station, he and defendant had a difficulty; that it commenced by the defendant throwing at deceased a whisky bottle; which, however, did not hit the deceased. Defendant then rushed upon him where he stood at a table. The deceased seized a mustard bottle, the mouth of which had been broken off; held it in his hand and struck the defendant over the head with it several times to keep him off from him [deceased]. That they were then separated and the defendant left, and he saw him no more until the occasion of the shooting. That deceased did not at the first difficulty at the camp nor at any previous time give the defendant any occasion to assault deceased as he did. Deceased stated that he came to Carson from the camps on Sunday afternoon. That the reason he left the camps and came to this town was because he wanted to evade Murphy; that just previous to leaving he was informed that Murphy had returned there. He also said that at the time of shooting he had no weapon upon his person. This is a statement of what he said as fully as I can give it.”

S. F. Swift, sheriff of Ormsby County, also a witness for the prosecution, testified, among other things, as follows:

“Murphy (the defendant) made a voluntary statement to me in regard to the difficulty. I had offered him no reward, nor threat, nor held out any inducement to him to obtain

State v. Murphy.

this statement. He said he was coming up the street when he saw deceased coming towards him. He thought deceased made a demonstration as if he was going after his pistol. He said he (Murphy) drew his pistol, when deceased was standing, as he thought, sideways, towards him; and that he fired about the time deceased started to run. That they ran through Benton's stable, and in the back end of the stable he fired his second shot and desisted. That he did not fire but two shots. That deceased looked over his (deceased's) shoulder, and Murphy told him to run. I asked him if he fired any more than two shots. He said no; he had fired off one previously. He also said the first shot took effect. This he told me a short time after he was confined in the jail. He also said deceased was between a post and himself, and that he (Murphy) thought deceased was going for his pistol at the time."

Robert M. Clarke, for Appellant.

L. A. Buckner, Attorney General, *William Patterson* and *Thomas Wells*, for Respondent.

By the Court, WHITMAN, C. J.:

When the prosecution rested in this case, motion was made for appellant's discharge upon the grounds—first, that there was no sufficient proof of the venue as laid in the indictment; second, that it was "not shown by any expert that the wound was dangerous or mortal, or that the death of the deceased was caused by the wound." Although the proof would appear to have been already redundant on the first point of objection, the court allowed a witness to testify thereon, and this is assigned as error. To permit the supplying of proof on this point, had it been necessary, would have been eminently proper at any stage of the case, and its refusal would have been a refusal of justice. Certainly it could be no more error, if unnecessarily allowed.

State v. Murphy.

To the second point it may be answered that no proof by experts was necessary, as seems to be held by counsel; and giving the objection its broadest scope, reference to the transcript will show that deceased, a strong and apparently healthy man, was wounded by two pistol shots fired by appellant; that he immediately took to his bed; suffered intensely for two days, and then died. If this, in absence of all opposing testimony, was not sufficient to go to the jury, it would be difficult to imagine adequate proof. It was properly submitted; and the jury decided by their verdict that it was conclusive upon the point, that the injury inflicted by the appellant was the proximate cause of death; and there is no showing that such decision was incorrect. It is also objected that evidence of so-called dying declarations was received against appellant's objection. The evidence was certainly not within the rule of dying declarations, being mainly a recital of matters occurring several days before the shooting. But the objection is not sufficiently pointed, being "that it (the evidence) was hearsay, and that the proper foundation for such testimony had not been laid by the witness." The court decided, and properly, that the foundation was sufficient. All evidence of dying declarations must necessarily be hearsay; while the specific objection to the evidence offered should have been to the character of the testimony, as not touching the cause of, or circumstances surrounding, the approaching death.

Admitting the objection to have been specific, yet the evidence was not of a character calculated to prejudice the appellant; it was irrelevant; and the transcript teems with such; but in fact appellant settled his own case by his confession to the sheriff.

The record discloses no error, and the judgment of the district court is affirmed.

State v. Summers.

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM SUMMERS, APPELLANT, [No. 2].

CRIMINAL LAW—APPEAL FROM NEW TRIAL ORDER TOO LATE AFTER APPEAL FROM JUDGMENT DISPOSED OF. Where a defendant in a criminal case, having taken an appeal from the judgment alone which was affirmed, took an appeal from the order overruling his motion for a new trial: *Held*, that the latter appeal was too late and should be dismissed.

APPEAL from the District Court of the Second Judicial District, Douglas County.

Defendant was convicted on May 27, 1874, of murder in the first degree for the killing of Frank Bean and sentenced to be hanged. At the July term of this Court he appealed from the judgment alone, which was affirmed. See *State v. Summers*, [No. 1], *ante*, 269. After the disposition of that appeal, he took this appeal from the order overruling his motion for a new trial. The counsel for the State thereupon moved to dismiss this appeal on the ground that it was too late.

L. A. Buckner, Attorney General, and *George P. Harding*, for Respondent.

Moses Tebbs and *Thomas Wells*, for Appellant.

By the Court, WHITMAN, C. J.:

At the last term of this Court, the judgment of the district court was affirmed against appellant. Now he seeks to have an order refusing a new trial reversed. The application is tardy. Even admitting as claimed by counsel, that the Criminal Practice Act gives to a defendant a double appeal, one from an order similar to the present and one from a final judgment, still it does not follow that such appeals can be taken in inverse order; that would be practice too bad to be charged even to the exceedingly incongruous mass of provisions composing the Criminal Practice Act of this State.

State v. Summers.

When the appellant brought up the judgment for review, he should have presented all anterior errors which he desired to correct. The error claimed in the present record, if existent, arose before the former appeal, and could and should have been therein considered, if so wished. It is too late to present it now; and the motion of respondent to dismiss the appeal, is granted.

Let the order be so made.



INDEX.

ABATEMENT.

PENDENCY OF ANOTHER INDICTMENT NOT MATTER IN ABATEMENT. See CRIMINAL LAW, 20.

ACCOMPLICE.

CORROBORATING TESTIMONY, WHAT. See EVIDENCE, 11.

ACCOUNT.

INTEREST ON BALANCE OF ACCOUNT—BALANCE ASCERTAINED BY PLEADING. See INTEREST.

ADMISSION OF VALUE OF GOODS SOLD AND DELIVERED—DRAYAGE ITEMS. See PRACTICE, 2.

ACTION.

PARTY TO ACTION CANNOT BE CHANGED BY AMENDMENT. See AMENDMENT.

REMOVAL OF SUIT TO FEDERAL COURT. See JURISDICTION, 2, 3, 4, 5.

PENDENCY OF EJECTMENT DOES NOT ESTOP PLAINTIFF FROM CLAIMING ADVERSE POSSESSION. See LIMITATIONS, 3.

MANDAMUS IMPROPER WHERE EJECTMENT AFFORDS FULL REMEDY. See MANDAMUS.

ACTION TO QUIET TITLE—PRIMA FACIE CASE FOR PLAINTIFF—BURDEN OF PROOF. See QUIETING TITLE, 1, 2.

AFFIDAVIT.**1. REQUIREMENTS OF AFFIDAVIT ON INFORMATION AND BELIEF TO ESTABLISH A FACT.**

Where the law requires any fact to be established by affidavit, without prescribing its form, if made upon information and belief, it will be insufficient unless it states positively the facts and circumstances upon which such belief is founded. *Morgan v. Eureka County Commissioners*, 360.

2. AFFIDAVIT FOR PUBLICATION OF SUMMONS. An affidavit for publication of summons against a non-resident defendant, which states legal conclusions instead of facts, is fatally defective. *Roy v. Whitford*, 370.

CRIMINAL LAW—AFFIDAVIT FOR CONTINUANCE. See **CRIMINAL LAW**, 19.

IDENTIFICATION OF AFFIDAVITS USED ON MOTIONS FOR NEW TRIAL. See **NEW TRIAL**, 5.

TOWN—GOVERNMENT ACT—AFFIDAVITS REQUIRED. See **TOWNS**, 1, 2.

AGENCY.**1. DUE BILLS SIGNED BY SUPERINTENDENT OF MINING COMPANY.** In a suit against the superintendent of a mining company on due bills signed by him, but adding after his signature "Supt. C. S. M. Co.": *Held*, that he might show that the consideration for the bills passed to the company, that the credit was given to it, that he had authority to bind it, and acted solely as such agent to the knowledge of the payers of the bills; and that the rejection of such proffered evidence was error. *Schaeffer v. Bidwell*, 209.**2. AGENCY NO DEFENSE TO ACTION OF TROVER.** A person is guilty of conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner and is ignorant of such person's want of title. *Bercich v. Marye*, 312.

ATTORNEY AS AGENT IN NEGOTIATION NOT IN COURT. See **ATTORNEY**.

AMENDMENTS.

PARTY TO ACTION CANNOT BE CHANGED BY AMENDMENT. An amendment which changes the parties to a suit cannot be made. *Little v. Virginia and G. H. W. Co.*, 317.

SUING THE WRONG CORPORATION—AMENDMENT NOT ALLOWED. See **PLEADING**, 7.

APPEAL.

1. APPEALS—OBJECTIONS TO RULINGS AT TRIAL TO BE ASSIGNED AS ERRORS. If an objection against a ruling of the court in refusing to strike out certain testimony is not specified in the assignment of errors, it will not be considered on appeal. *Sherman v. Shaw*, 148.
2. APPELLANT MUST SHOW INJURY. Where, though the evidence is very conflicting, there is substantial testimony to sustain the verdict, and the law touching the different theories of the losing party is fairly stated in the charge of the court, the verdict and judgment will not be disturbed. *Menzies v. Kennedy*, 152.
3. WHAT OBJECTIONS NOT AVAILABLE ON APPEAL IF NOT TAKEN BELOW. Objections, not seasonably and clearly presented in the court below, are unavailable on appeal, if they are such as might by legal possibility have been obviated if so taken in the court below. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
4. CRIMINAL LAW—APPEAL FROM NEW TRIAL ORDER TOO LATE AFTER APPEAL FROM JUDGMENT DISPOSED OF. Where a defendant in a criminal case, having taken an appeal from the judgment alone which was affirmed, took an appeal from the order overruling his motion for a new trial: *Held*, that the latter appeal was too late and should be dismissed. *State v. Summers* [No. 2], 309.

CRIMINAL APPEALS—PRESUMPTIONS IN FAVOR OF INSTRUCTIONS. See CHARGE, 1.

JURISDICTION ON HABEAS CORPUS NOT APPELLATE. See HABEAS CORPUS, 2.

JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE. See JUSTICE OF THE PEACE, 2.

WEIGHT OF EVIDENCE ON MOTION FOR NEW TRIAL AND ON APPEAL. See NEW TRIAL, 4.

IDENTIFICATION OF AFFIDAVITS USED ON MOTION FOR NEW TRIAL. See NEW TRIAL, 5, 6.

NEW TRIAL STATEMENT CANNOT BE CERTIFIED AFTER APPEAL. See STATEMENT, 2.

ASSAULT.

ASSAULT WITH INTENT TO "KILL AND MURDER"—SURPLUSAGE. Where an indictment in setting out an assault with intent to kill charged an "intent

to kill and murder": *Held*, that as there was no statutory offense of an attempt "to kill and murder" or "to murder," the words "and murder" were unmeaning and should be rejected. *State v. Johnson*, 175.

ASSAULT WITH INTENT TO COMMIT MURDER. See CRIMINAL LAW, 1.

ARSON.

EVIDENCE OF OVER-INSURANCE TO SHOW MOTIVE. See EVIDENCE, 6.

WHEN INSURANCE MAY BE PROVED BY PAROL. See EVIDENCE, 8.

ATTACHMENT.

1. PERISHABLE PROPERTY, WHAT. The term "perishable property" as used in the statute providing for its speedy sale when seized on attachment (Practice Act, sec. 133) applies only to property which is necessarily subject to immediate decay; and does not apply to property, like hay, which could with ordinary or reasonable care, appropriate to its particular species, be preserved. *Newman v. Kane*, 234.
2. ORDER ON PROCEEDINGS AGAINST GARNISHEE NOT REVIEWABLE ON CERTIORARI. Where a district judge, in proceedings under section 131 of the Practice Act, made an order requiring a garnishee to deliver to the sheriff moneys in her hands claimed to belong to the attachment debtor: *Held*, that as the statute conferred upon the judge full jurisdiction over person and subject matter, his order, however erroneous, could not be reviewed on certiorari. *Birchfield v. Harris*, 382.

WRONGFUL SALE OF PROPERTY ATTACHED—TIME OF CONVERSION—MEASURE OF DAMAGES. See CONVERSION.

SHERIFF MUST PRESERVE ATTACHED PROPERTY. See SHERIFF.

ATTORNEY.

ATTORNEY AS AGENT IN NEGOTIATION NOT IN COURT. Where a clerk converted mining stock of his employer and deposited the larger part of the proceeds in a bank, and afterwards, having confessed, was called to an interview with the employer and his lawyer in the private rooms of the employer; where, upon disclosing the deposit, he was sent by the lawyer for the certificate of deposit, which he brought, endorsed over and delivered to the lawyer; and also delivered over certain other moneys of his own to the lawyer,

who received them without stating in what character he accepted the same ; and the employer said nothing : *Held*, that the clerk was justified in regarding the transaction with the lawyer as done with his employer. *Marye v. Martin*, 28.

ARGUMENTSWHERE CASE SUBMITTED ON OTHER SIDE. See CRIMINAL LAW, 13.

BANK.

CITIZENSHIP OF FIRST NATIONAL BANK OF NEVADA. See CORPORATIONS, 1.

BOND.

RECOGNIZANCE—"BRIEFLY STATING NATURE OF OFFENSE." See RECOGNIZANCE, 1.

RECOGNIZANCE NOT IN STATUTORY FORM. See RECOGNIZANCE, 2.

BROKER.

LIABILITY OF BROKER TO TRUE OWNER FOR STOLEN STOCK SOLD. Where a broker received in the course of trade a transfer in blank of stock in a mining company, organized under the laws of California, which had in fact been stolen, and sold it : *Held*, that he was liable to the true owner for its value and damages. *Bercich v. Marye*, 312.

BY-LAWS.

BY-LAWS OF MINING COMPANY—ADOPTION BY LONG USE. See CORPORATIONS, 2.

CORPORATION CANNOT MAKE BY-LAWS CONTRARY TO CHARTER. See CORPORATIONS, 4.

MINING COMPANY ELECTIONS—EXTENT OF REGULATION BY BY-LAWS. See, CORPORATIONS, 5.

CERTIORARI.

"BENEFICIAL INTEREST" TO SUSTAIN CERTIORARI AS TO PROCEEDINGS UNDER TOWN GOVERNMENT ACT. A tax-payer of the county and resident of a town, purporting to have been organized under the town government act of 1873

(Stats. 1873, 74), who has been sued for a license imposed by such town, has sufficient "beneficial interest" to maintain certiorari as to the proceedings of the county commissioners in establishing the government of such town. *Morgan v. Eureka County Commissioners*, 360.

ORDER ON PROCEEDINGS AGAINST GARNISHEE NOT REVIEWABLE ON CERTIORARI. See ATTACHMENT, 2.

PROCEEDINGS OF DISTRICT COURT BEYOND ITS JURISDICTION TO BE ANNULLED See JURISDICTION, 6.

ACTION OF JUSTICE WITHOUT JURISDICTION VOID—CERTIORARI. See JUSTICE OF THE PEACE, 4.

CHALLENGE.

RIGHT TO TRAVERSE CHALLENGE TO GRAND JUROR AFTER WAIVER OF TRAVERSE. See GRAND JURY, 2.

CITIZENSHIP.

CITIZENSHIP OF FIRST NATIONAL BANK OF NEVADA. See CORPORATIONS, 1.

CHARGE.

1. CRIMINAL APPEALS—PRESUMPTIONS IN FAVOR OF INSTRUCTIONS. On appeal in a criminal case, where the testimony is not carried up, it will be presumed that the instructions to the jury were applicable to the proofs unless it clearly appears that no case could reasonably be imagined in which they would be correct. *State v. Keith*, 15.
2. CHARGING DIFFERENT WAYS—PRESUMPTION. Where the record in a criminal case shows that the court differently defined the law upon any given subject, one clause being correct and the other erroneous, injury will be presumed to follow, unless it clearly appears that no injury resulted therefrom. *State v. Ferguson*, 106.
3. CRIMES ACT, SEC. 26, AS AN INSTRUCTION. As a bare fear that defendant is in danger of his life, or of receiving great bodily harm, will not justify him in taking life: *Held*, in a murder case, where defendant claimed to have acted in self-defense, that reading section 26 of the act concerning crime and punishments as an instruction to the jury, was not error. *State v. Stewart*, 120.

4. **READING FROM STATUTE IS NOT GIVING ORAL INSTRUCTION.** Reading certain sections from the statute as instructions to the jury, is not giving oral instructions. *State v. Stewart*, 120.
5. **CHARGING A FACT WITH A PRECEDING "IF."** Where in a suit for the conversion of mining stock the court, in instructing the jury, used the language, "If the plaintiff consented to place his stock in the original pool, which pool was subsequently broken up," etc.; and it was objected that this was charging as a fact that the pool was broken up: *Held*, that the word "which" as there used was dependent on a *if* to be supplied and should be understood as *if*, instead of "which" the words "and if that" had been employed. *Menzies v. Kennedy*, 152.
6. **STATING TO JURY A FACT NOT CONTROVERTED.** There is no error in stating to the jury as a fact a circumstance that is testified to by both parties, and about which there is no controversy. *Menzies v. Kennedy*, 152.
7. **INSTRUCTION MUST BE APPLICABLE TO CASE.** Where a jury had been fully charged and there was nothing in the instructions to indicate that a mere presumption, inference or guess would be sufficient to warrant the finding of a fact: *Held*, that it was no error to refuse an instruction to the effect that such a mere presumption, inference or guess would not be sufficient. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
8. **CHARGING A FACT, ERROR—EXTENT OF RECOVERY IN REPLEVIN.** Where in a replevin case for a band of sheep, the description of which was vague though some were described and all stated to be of the value of three dollars per head, the court charged that there was nothing in the description to distinguish one sheep or class of sheep from another and that plaintiff must recover all or none: *Held*, erroneous both as involving a question of fact and as not clearly stating the law. *Buckley v. Buckley*, 360.

PRACTICE ON REFUSING INSTRUCTIONS ALREADY GIVEN. See CRIMINAL LAW, 11.

COMMITMENT.

RECOGNIZANCES AND COMMITMENTS, RULES OF CONSTRUCTION DIFFERENT. See CONSTRUCTION, 1.

HABEAS CORPUS—COMMITMENT BY JUSTICE OF THE PEACE. See HABEAS CORPUS, 1.

CONSTITUTION.

1. **ESMERALDA COUNTY REDEMPTION-FUND ACTS NOT UNCONSTITUTIONAL.** The statutes of 1867 and 1869, creating a fund and providing for the redemption in a certain manner of outstanding indebtedness of Esmeralda County (*Stats.* 1867, 76; 1869, 58), are not in violation of the constitutional provision (*Art. IV., Sec. 20*) against "special and local laws regulating county business," nor do they impair the obligation of contracts. *Youngs v. Hall*, 212.
2. **STATUTE TO EMBRACE BUT ONE SUBJECT—CONSTITUTION, ART. IV, SEC. 17.** The design of the constitutional provision that a statute shall embrace but one subject, to be briefly expressed in the title (*Const. Art. IV, Sec. 17,*) is to prevent improper combinations to secure the passage of laws containing subjects having no necessary or proper relation and which as independent measures could not be carried; also to prevent the legislature and the public from being misled by the title. *State v. Silver*, 227.
3. **ONLY ONE CONSTITUTIONAL POLL TAX.** As the constitution prescribes specifically what poll tax may be levied (*Art. II, Sec. 7,*) such indication excludes from legislative power any other. *Hassett v. Walls*, 387.

CONSTRUCTION OF CONSTITUTION, ART. IV, SEC. 20—GIVING EFFECT TO EVERY WORD. See **CONSTRUCTION**, 3.

ACT ESTABLISHING BOUNDS AND EXEMPTING JURORS NOT UNCONSTITUTIONAL
See **JURY**, 2.

GIFT CONCERT ACT UNCONSTITUTIONAL. See **LOTTERY**, 1, 3.

PROVISION RELATING TO KILLING OF STOCK IN MARKS AND BRANDS STATUTE UNCONSTITUTIONAL. See **MARKS AND BRANDS**.

ROAD TAX OF 1873 UNCONSTITUTIONAL. See **ROADS**, 1.

WHAT ARE LAWS "REGULATING COUNTY BUSINESS." See **STATUTES**, 1.

STATUTE MAY EMBRACE MATTERS GERMAIN TO SUBJECT. See **STATUTES**, 9.

CONSTRUCTION.

1. **RECOGNIZANCES AND COMMITMENTS, RULES OF CONSTRUCTION DIFFERENT.** The reasons for setting forth the particulars of the offense in a commitment do not exist in the case of a recognizance; and therefore the construction requiring such particularity given to the words, "briefly stating the nature of the offense," as used in the statutory form of commitments (*Crim. Pr. Act*,

Sec. 166,) is not applicable to the same words as used in the statutory form of recognizances (Crim. Pr. Act, Sec. 504.) *State v. Birchim*, 95.

2. CONSTRUCTION OF STATUTES "IN PARI MATERIA." Section 12 of the judiciary act of congress of 1789, and the acts of congress of July 27, 1866, and March 2, 1867, all relating to the removal of causes from state to federal Courts, being *in pari materia*, must be construed together. *Davis v. Cook*, 134.
3. CONSTRUCTION OF CONSTITUTION, ART. IV., SEC. 20—GIVING EFFECT TO EVERY WORD. As in expounding a constitutional provision such construction should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant; full and distinct meaning should be given to each of the words "local" and "special" in the constitutional provision against "local and special laws regulating county business," *Yongs v. Hall*, 212.
4. WHEN BY-LAW, PARTLY VOID, IS WHOLLY VOID. If part of a by-law is void and the whole forms an entirety, so that the part which is void influences the whole, the entire by-law is void. *State ex rel. Corey v. Curtis*, 325.

CHARGING A FACT WITH A PRECEDING "IF." See CHARGE, 5.

SUBSCRIPTION AGREEMENT WHEN NO PAYEE NAMED—CONSTRUCTION. See CONTRACTS, 1.

CONSTRUCTION OF STATUTES EXCLUSIVELY A JUDICIAL POWER. See JURISDICTION, 1.

CONSTRUCTION OF PLEADING—ALLEGATION OF PLACE OF CORPORATION. See PLEADING, 6.

DISTINCTIONS BETWEEN STATUTES. See STATUTES, 2, 3, 4, 5, 6, 7.

CONTINUANCE.

1. GRANTING OR REFUSING CONTINUANCE MATTER OF DISCRETION. The granting or refusing of a continuance in a criminal case rests in the sound discretion of the court, and its ruling will not be disturbed on appeal, unless an abuse of discretion is shown. *State v. Rosemurgey*, 308.

CRIMINAL LAW—AFFIDAVIT FOR CONTINUANCE. See CRIMINAL LAW, 19.

CONTRACTS.

1. SUBSCRIPTION AGREEMENT WHERE NO PAYEE NAMED—CONSTRUCTION. Where certain persons subscribed money towards building a quartz mill, in which all the subscribers were to be interested ; and the subscription paper, without naming any payee, provided that the money was to be paid in such manner and at such time as the majority of the subscribers might order : *Held*, that the subscription was for the mutual benefit of all the subscribers. *Wheeler v. Floral Mill and M. Co.*, 254.
2. RECOVERY OF SUBSCRIPTION—MUTUALITY BETWEEN PARTIES. Where it is attempted to recover subscriptions, it must appear that there is mutuality between the parties, and that the terms of the agreement have been complied with. *Wheeler v. Floral Mill and M. Co.*, 254.
3. CONTRACT VOID UNDER STATUTE OF FRAUDS. Where the condition precedent of a contract is the delivery and reception of chattels to be kept for two years, and there is no written agreement, the contract is void under the statute of frauds. *Buckley v. Buckley*, 373.

DUE BILLS SIGNED BY SUPERINTENDENT OF MINING COMPANY. See AGENCY, 1.

TAKING NOTE IN NAME OF FIRM FOR INDIVIDUAL DEBT WITH FULL KNOWLEDGE. See PARTNERSHIP, 2.

CONVERSION.

WRONGFUL SALE OF PROPERTY ATTACHED—TIME OF CONVERSION—MEASURE OF DAMAGES. Where a sheriff, having attached certain hay in the field, had it baled and sold as perishable, and afterwards the person attached recovered judgment and demanded the property : *Held*, that the conversion took place at the time of sale and not at the time of demand and refusal, and that the measure of damages was the market value at the time of sale with interest therefrom. *Newman v. Kane*, 234.

AGENCY NO DEFENSE TO ACTION OF TROVER. See AGENCY, 2.

DAMAGES FOR CONVERSION OF STOCK. See DAMAGES, 1, 2.

CORPORATIONS.

1. CITIZENSHIP OF FIRST NATIONAL BANK OF NEVADA. The First National Bank of Nevada, having its location in Nevada, is a citizen of the State of Nevada. *Davis v. Cook*, 134.

2. **BY-LAWS OF MINING COMPANY—ADOPTION BY LONG USE.** Where what purported to be the by-laws of a California mining corporation, though adopted by the stockholders instead of the trustees, appeared to be the only by-laws ever adopted by the corporation and were found properly recorded in the books kept by the trustees and had been used, acted upon and referred to as the by-laws, both by the trustees and stockholders, for upwards of ten years and ever since their adoption: *Held*, that they were to be considered and treated as the regular by-laws of the corporation. *State ex rel. Corey v. Curtis*, 325.
 3. **ELECTION OF MINING COMPANY TRUSTEE A CORPORATE ACT.** The election of a trustee of a mining corporation to fill a vacancy is a corporate act and must be exercised in the manner required by the charter. *State ex rel. Corey v. Curtis*, 325.
 4. **CORPORATION CANNOT MAKE BY-LAWS CONTRARY TO CHARTER.** Where the statute under which a corporation was organized required a majority of the trustees to do a corporate act and a by-law authorized a vacancy in the office of trustee to be filled by a less number than a majority: *Held*, that such by-law, being contrary to the charter, was void. *State ex rel. Corey v. Curtis*, 325.
 5. **MINING COMPANY ELECTIONS—EXTENT OF REGULATION BY BY-LAWS.** Under the California laws in reference to mining corporations, the *manner* of an election of a trustee may be regulated by the by-laws; but the *substance* must be in conformity with the statute. *State ex rel. Corey v. Curtis*, 325.
- DUE BILLS SIGNED BY SUPERINTENDENT OF MINING COMPANY. See AGENCY, 1.
- WHEN BY-LAW, PARTLY VOID, IS WHOLLY VOID. See CONSTRUCTION, 4.
- CONSTRUCTION OF PLEADING—ALLEGATION OF PLACE OF CORPORATION. See PLEADING, 6.
- SUING THE WRONG CORPORATION—AMENDMENT NOT ALLOWED. See PLEADING, 7.
- STOCK IN CALIFORNIA MINING COMPANY, NOT NEGOTIABLE. See STOCK.

COUNTER CLAIM.

[See SET-OFF.]

COUNTIES.

ACTS ESTABLISHING BOUNDS AND EXEMPTING JURORS. See JURY, 1.

LAWS "REGULATING COUNTY BUSINESS." See STATUTES, 1.

A GENERAL STATUTE NEED NOT BE APPLICABLE TO ALL COUNTIES. See STATUTES, 3.

CHANGING APPLICATION OF INCOMING REVENUE OF COUNTY. See STATUTES, 8.

COUNTY COMMISSIONERS.

1. COUNTY COMMISSIONERS CANNOT COMPROMISE TAX SUITS. The board of county commissioners have no power to compromise and settle suits instituted by the State for the collection of delinquent taxes. *State v. Central Pacific R. R. Co.*, 79.
2. POWERS OF COUNTY COMMISSIONERS SPECIAL AND LIMITED. Boards of county commissioners are inferior tribunals of special and limited jurisdiction, and their action must affirmatively appear to be in conformity with some provision of law giving them power or it will be without authority. *State v. Central Pacific R. R. Co.*, 79.

AUTHORITY AS TO ROOMS IN COURT HOUSE. See MANDAMUS.

POWER AS TO TAXES. See TAXES, 2, 3.

COURTS AND JUDGES.

CRIMINAL LAW—DEPARTURE FROM ORDER OF PROOF—DISCRETION. See CRIMINAL LAW, 8.

DEATH PENALTY—TIME OF EXECUTION FIXED BY WARRANT. See CRIMINAL LAW, 18.

CONSTRUCTION OF STATUTES EXCLUSIVELY A JUDICIAL POWER. See JURISDICTION, 1.

REMOVAL OF SUITS TO FEDERAL COURTS. See JURISDICTION, 2, 3, 4, 5.

PROCEEDINGS OF DISTRICT COURT BEYOND ITS JURISDICTION TO BE ANNULLED. See JURISDICTION, 6.

ACTS OF CONGRESS RELATING TO MINING CLAIMS—JURISDICTION OF STATE COURTS. See MINES.

CRIMINAL LAW.

1. ASSAULT WITH INTENT TO COMMIT MURDER. Where on a trial for assault with intent to commit murder the court instructed the jury to convict if it found that defendant made an assault with a deadly weapon upon the person named, about the time charged, and in such manner that the offense would have been murder in the second degree had the assault resulted in death: *Held*, unobjectionable. *State v. Keilh*, 15.
2. CRIMINAL LAW—UNCERTAINTY IN SENTENCE. Where a person was sentenced to imprisonment in the State prison for a term of one year, to commence upon the expiration of another term; and one year afterwards the first judgment and sentence were adjudged void: *Held*, on habeas corpus, that the sentence either commenced to run immediately on rendition and had expired, or it was void for uncertainty, and in either case the prisoner was entitled to his discharge from the State prison. *Ex parte Roberts*, 44.
3. LARCENY OF PROPERTY STOLEN IN AND BROUGHT FROM ANOTHER STATE. If a person commits larceny in one country or state and carries the goods stolen into another country or state and there makes any removal or asportation of them, having in his mind the intent to steal, he may be properly indicted for larceny of them in the latter locality. *State v. Newman*, 48.
4. MERE POSSESSION WITH FELONIOUS INTENT OF PROPERTY STOLEN IN ANOTHER STATE NOT LARCENY. In a trial for larceny of property, which had been stolen in another state and brought into this State, the court instructed the jury that if the accused was in possession of the property in this State with a felonious intent to steal, take and drive it away, it should convict, though the original taking away had been in another state: *Held*, error. *State v. Newman*, 48.
5. MURDER—WHEN "THREATS" AVAILABLE IN DEFENSE. A person on trial for murder cannot avail himself of threats or menaces previously made against him by deceased, unless he at the time of the killing was actually assailed or had sufficient evidence to convince a reasonable person that he was in danger of incurring bodily injury or of losing his life at the hands of deceased. *State v. Hall*, 58.
6. ANTECEDENT THREATS ALONE DO NOT JUSTIFY HOMICIDE. In a murder case where it appeared that threats to kill had been made by deceased against defendant some time before the homicide but that the fatal meeting with deceased had been sought by defendant for the avowed purpose of killing him, the court instructed the jury that all antecedent threats are dependent upon the facts at the time of the killing and in order to justify the homicide it must appear that at the time of the killing there was some action which

would induce a reasonable man to believe that he was in danger of losing his life : *Held*, no error in instructing that there must have been some action on the part of deceased at the time of killing. *State v. Hall*, 58.

7. TIME FOR "IRRESISTIBLE PASSION" TO COOL. In a murder case, where the defense is justification on account of irresistible fear or passion caused by acts of deceased and without time to cool, the question for the jury to consider is whether there was time for a reasonable man to cool his passion or quiet his fears, not whether the one was cooled or the other quieted. *State v. Hall*, 58.
8. CRIMINAL TRIALS—DEPARTURE FROM ORDER OF PROOF—DISCRETION. In a criminal trial, if a district court allows a departure from the ordinary order of proof and permits a re-opening of the case, as it may in the exercise of a sound discretion (Stats. 1861, 472,) it will be presumed, nothing being shown to the contrary, that such discretion was properly exercised. *State v. Harrington*, 91.
9. QUESTION OF JUSTIFIABLE HOMICIDE IN CASE OF COMBAT. In a murder case where the defense was justifiable homicide, and the testimony showed a quarrel and combat between defendant and deceased, the court, after charging in relation to the law of murder and manslaughter, added, "And to justify the homicide it must appear that there existed an unavoidable necessity, without any will or desire, or without any inadvertence or negligence in the party killing." *Held*, that the principle announced (Crim. Pr. Act, Sec. 29) related to an entirely different class of cases from that presented by the testimony, and that the charge was clearly erroneous. *State v. Ferguson*, 106.
10. JUSTIFIABLE HOMICIDE—DEFENDANT'S BELIEF OF DANGER. An instruction asked by defendant in a murder case that "If at the time of the homicide defendant had reason to believe, and did believe, that he was in danger of receiving great bodily harm at the hands of deceased, he had a right to defend himself, even to the taking the life of his adversary." *Held*, erroneous, in this : that it assumed that defendant was without fault. *State v. Ferguson*, 106.
11. CRIMINAL LAW—PRACTICE ON REFUSING INSTRUCTIONS ALREADY GIVEN. If an instruction is refused because its substance has been given, that fact should be stated and noted on the instruction. *State v. Ferguson*, 106.
12. THE LAW OF SELF-DEFENSE. The law of self-defense is founded on necessity and in order to justify the taking of life upon this ground it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm ; but it must also appear to the defendant's comprehension, as a reasonable man, that to

avoid such danger; it was necessary for him to take the life of the deceased *State v. Stewart*, 120.

13. **ARGUMENTS, WHERE CASE SUBMITTED ON OTHER SIDE.** Where, in a criminal case, the State was represented by two attorneys; and after the first had opened the argument to the jury, the defendant's attorney submitted the case and objected to any further argument; but the other attorney for the State was allowed to address the jury: *Held*, no abuse of discretion. *State v. Stewart*, 120.
14. **PROSECUTION CANNOT MAKE ACCUSED ITS OWN WITNESS.** Though an accused person may become a witness in his own behalf and thereby subject himself to cross-examination, the prosecution cannot make him, against his consent, its own witness. *State v. Cohn*, 179.
15. **WHO IS "PROSECUTOR" IN A CRIMINAL TRIAL.** A prosecutor is one who instigates the prosecution by making the affidavit upon which the accused is arrested; so that the person named in the indictment as the owner of the property, in respect to which the alleged crime is charged to have been committed is not necessarily the prosecutor. *State v. Cohn*, 179.
16. **MALICIOUS KILLING OF CATTLE A MISDEMEANOR.** Section 143 of the Crimes Act, making the malicious killing of cattle a misdemeanor, is unaffected by the provision in the act regulating marks and brands, making it a felony (Stats. 1873, 99, Sec. 10)—the latter provision being unconstitutional. *State v. Silver*, 227.
17. **FIXING TIME OF EXECUTION NOT PART OF JUDGMENT IN CAPITAL CASE.** A judgment of conviction of murder in the first degree, which fixes a time for the execution of the sentence more than sixty days from its date, contrary to the statute, is not therefore void; for the reason that such fixing of time is not properly a part of the judgment and may be rejected as surplusage. *State v. Summers* [No. 1], 269.
18. **DEATH PENALTY—TIME OF EXECUTION FIXED BY WARRANT.** Under the criminal law (Stats. 1861, 484, Sec. 454) it is the warrant and not the judgment which fixes the time for executing the death sentence; and the court may at any time issue the warrant in due form of law. *State v. Summers* [No. 1], 269.
19. **CRIMINAL LAW—AFFIDAVIT FOR CONTINUANCE.** An affidavit for continuance in a criminal case on account of the absence of witnesses should give assurance of their attendance at the time to which it is proposed to continue, and show the means of affiant's information; and unless such attendance seems probable the continuance should be denied. *State v. Rosemurgey*, 308.

20. PENCY OF ANOTHER INDICTMENT NOT MATTER IN ABATEMENT. The pendency of another indictment has never been held to constitute matter in abatement. *State v. Lambert*, 321.
21. FAILURE TO INDICT AT NEXT TERM. The object of the Criminal Practice Act in providing that a person held to answer shall be indicted at the next term of the court (Comp. Laws, Sec. 2206) is to protect the citizen from imprisonment upon insufficient cause; but such provision has no bearing upon the validity of an indictment found at a subsequent term. *State v. Lambert*, 321
22. CRIMINAL LAW—SUPPLYING PROOF OF VENUE AFTER PROSECUTION RESTS. Where in a criminal case after the prosecution rested defendant moved for his discharge on the ground that there had been no proof of venue; and the court thereupon allowed the State to call a witness and prove a venue: *Held*, eminently proper. *State v. Murphy*, 394.

APPEAL FROM NEW TRIAL ORDER TOO LATE AFTER APPEAL FROM JUDGMENT DISPOSED OF. See APPEAL, 4.

ASSAULT WITH INTENT TO KILL AND MURDER—SURPLUSAGE. See ASSAULT.

CRIMINAL APPEALS—PRESUMPTIONS IN FAVOR OF INSTRUCTIONS. See CHARGE, 1.

CHARGING DIFFERENT WAYS—PRESUMPTION. See CHARGE, 2.

CRIMES ACT, SEC. 26 AS AN INSTRUCTION. See CHARGE, 3.

READING FROM STATUTE IS NOT GIVING ORAL INSTRUCTION. See CHARGE, 4.

GRANTING OR REFUSING CONTINUANCE MATTER OF DISCRETION. See CONTINUANCE.

MEANING OF "MALICE AFORETHOUGHT." See DEFINITIONS, 1.

EVIDENCE—MORAL CERTAINTY. See EVIDENCE, 1.

CRIMINAL LAW—DECLARATIONS OF DEFENDANT—RES GESTÆ. See EVIDENCE, 2.

EFFECT TO BE GIVEN DEFENDANT'S OWN TESTIMONY. See EVIDENCE, 3.

ARSON—EVIDENCE OF OVER-INSURANCE TO SHOW MOTIVE. See EVIDENCE, 6.

MOTIVE AS A CIRCUMSTANCE EVIDENCE. See EVIDENCE, 7.

ARSON—WHEN INSURANCE MAY BE PROVED BY PAROL. See EVIDENCE, 8.

CORROBORATING TESTIMONY, WHAT. See EVIDENCE, 11.

DYING DECLARATIONS, WHAT ARE ADMISSIBLE. See EVIDENCE, 12, 13, 14.

NO ERROR IN ADMISSION OF UNPREJUDICIAL TESTIMONY, THOUGH IRRELEVANT.
See EVIDENCE, 16.

EXCUSING GRAND JUROR BY MISTAKE AND RECALLING HIM. See GRAND
JURY, 1.

RIGHT TO TRAVERSE CHALLENGE TO GRAND JUROR AFTER WAIVER OF TRA-
VERSE. See GRAND JURY, 2.

MURDER—SUFFICIENCY OF INDICTMENT. See INDICTMENT, 1.

INDICTMENT—MISSTATEMENT OF LEGAL APPELLATION OF CRIME. See INDICT-
MENT, 2.

OBJECTION TO INDICTMENT FOR CHARGING TWO OFFENSES—DEMURRER. See
INDICTMENT, 3.

VOID JUDGMENT VOID AB INITIO. See JUDGMENT, 1.

NO LARCENY WITHOUT ACT AS WELL AS INTENT. See LARCENY, 1.

DISTINCT LARCENIES AT SAME TIME AND PLACE. See LARCENY, 2.

MURDER—PHYSICAL DISABILITY OF ACCUSED. See MURDER, 2.

MERE THREATS WILL NOT JUSTIFY HOMICIDE. See MURDER, 4.

MURDER—PROOF BY EXPERTS OF MORTAL CHARACTER OF WOUND NOT INDIS-
PENSABLE. See MURDER, 5.

PRESUMPTION FROM USE OF DEADLY WEAPON. See PRESUMPTIONS.

RECOGNIZANCE — “BRIEFLY STATING NATURE OF OFFENSE.” See RECOG-
NIZANCE, 1.

IMPEACHMENT OF VERDICT BY JUROR. See VERDICT, 1.

RECOMMENDATION TO MERCY NO PART OF VERDICT. See VERDICT, 2.

EXTENT OF CROSS-EXAMINATION OF ACCUSED, See WITNESS, 2.

DAMAGES.

1. **DAMAGES FOR CONVERSION OF STOCK—IMMATERIAL ERROR.** In a suit for conversion of mining stock: *Held*, that though it was error to charge the jury that plaintiff was entitled to recover the highest market value of the stock between the time of demand and the commencement of the action; yet, if it appeared that the jury, notwithstanding the charge, gave the lowest instead of the highest price, the error in the charge was immaterial. *Menzies v. Kennedy*, 152.
2. **MEASURE OF DAMAGES IN STATUTORY ACTION FOR CLAIM AND DELIVERY OF PERSONAL PROPERTY.** The market value of stock at the date of conversion is the measure of damages in the action of trover; but in the statutory action of claim and delivery of personal property, in case a return cannot be had, the value of the stock at the day of trial, with the dividends that have been paid upon it as damages for detention, is the only complete indemnity. *Bercich v. Marye*, 312.

LIABILITY OF BROKER TO TRUE OWNER FOR STOLEN STOCK SOLD. See **BROKER.**

WRONGFUL SALE OF PROPERTY ATTACHED—TIME OF CONVERSION—MEASURE OF DAMAGES. See **CONVERSION.**

WHAT CONTRIBUTORY NEGLIGENCE OF PLAINTIFF WILL RELIEVE DEFENDANT. See **NEGLIGENCE**, 4.

DEED.

1. **TRANSFER OF RIGHTS TO USE TIMBER LAND.** The occupation or use of land valuable for timber by a person's grantors inures as much to the grantee's interest as any other act; and if such grantor would have the right to recover in an action on account thereof, his grantee would have the same right. *Eureka Mining & S. Co. v. Way*, 349.

DEED OF TRUSTEE UNDER CONGRESSIONAL TOWN SITE ACT NOT CONCLUSIVE. See **TOWN SITE.**

DEFINITIONS.

1. **MEANING OF "MALICE AFORETHOUGHT."** Where in a murder case the court instructed the jury "that malice aforethought of the statute means a wrongful act done intentionally and without legal cause or excuse:" *Held*, no error. *Slate v. Stewart*, 120.

2. "IMMEDIATE" AND "PROXIMATE" CAUSE THE SAME. In speaking of the contributory negligence of a plaintiff as a cause of damages, which will relieve a defendant from liability, the words "immediate cause" and "proximate cause" are indiscriminately used to express the same meaning. *Longbaugh v. Virginia City and T. R. R. Co.*, 271.

PERISHABLE PROPERTY, WHAT. See ATTACHMENT, 1.

"UNAVOIDABLE NECESSITY." See MURDER, 1.

"NO VISIBLE PROPERTY" NOT EQUIVALENT TO "NO PROPERTY." See PLEADING, 1.

OCCUPATION OF TIMBER LAND. See POSSESSION, 3.

LAWS "REGULATING COUNTY BUSINESS." See STATUTES, 1.

DISINCTIONS BETWEEN STATUTES. See STATUTES, 2, 5, 6.

DEMURRER.

DEMURRER TO INDICTMENT. See INDICTMENT, 1, 2, 3.

DISCRETION.

GRANTING OR REFUSING CONTINUANCE MATTER OF DISCRETION. See CONTINUANCE.

CRIMINAL LAW—DEPARTURE FROM ORDER OF PROOF—DISCRETION. See CRIMINAL LAW, 8.

EXTENT OF CROSS-EXAMINATION OF ACCUSED. See WITNESS, 2.

DYING DECLARATIONS.

DYING DECLARATIONS, WHAT ARE ADMISSIBLE. See EVIDENCE, 12, 13, 14.

EJECTMENT.

KIND OF POSSESSION NECESSARY TO MAINTAIN EJECTMENT. Where possession is relied upon to maintain ejectment, it must be an actual, bona fide possession, a subjection to the will and dominion of the claimant, as contradistinguished from the mere assertion of title and the exercise of occasional acts of ownership. *Kraft v. Carlow*, 20.

PENDENCY OF EJECTMENT DOES NOT ESTOP PLAINTIFF FROM CLAIMING ADVERSE POSSESSION. See LIMITATIONS, 3.

MANDAMUS IMPROPER WHERE EJECTMENT AFFORDS FULL REMEDY. See MANDAMUS.

ELECTIONS.

ELECTION OF MINING COMPANY TRUSTEE A CORPORATE ACT. See CORPORATION, 3.

MINING COMPANY ELECTIONS—EXTENT OF REGULATION BY BY-LAWS. See CORPORATIONS, 5.

EQUITY.

1. REMEDY IN EQUITY TO SET ASIDE VOID JUDGMENT. Where a party, against whom a void judgment has been rendered, exhausts his remedy by motion to have it set aside, he may maintain a suit in equity for that purpose. *Dalton v. Libby and Lamburth*, 192.

2. JUDGMENTS NOT SET ASIDE IN EQUITY FOR MATTERS AVAILABLE AS DEFENSE. In a suit to set aside a judgment on an injunction bond, on the ground that the judgment in the injunction suit was rendered out of term and therefore void: *Held.* that the facts touching the invalidity of the judgment in the injunction suit should have been set up in defense to the action on the bond; and in the absence of such defense the judgment on the bond should stand. *Dalton v. Libby and Lamburth*, 192.

INJUNCTION, WHEN TO BE DISSOLVED—DENIAL OF EQUITIES. See INJUNCTION, 1, 2.

REMEDIES AGAINST JUSTICES' JUDGMENTS—WHEN EQUITY WILL NOT INTERFERE. See JUSTICE OF THE PEACE, 1.

ACTION TO QUIET TITLE. See QUIETING TITLE, 1, 2.

ERROR.

OBJECTIONS TO RULINGS AT TRIAL TO BE ASSIGNED AS ERRORS. See APPEAL, 1.

DAMAGES FOR CONVERSION OF STOCK—IMMATERIAL ERROR. See DAMAGES, 1.

EXCLUSION OF EVIDENCE AFTERWARDS ADMITTED. See EVIDENCE, 5.

NO ERROR IN ADMISSION OF UNPREJUDICIAL TESTIMONY, THOUGH IRRELEVANT.
See EVIDENCE, 16.

PRACTICE IN CASES OF CONTEST FOR PUBLIC LAND. See NEW TRIAL, 3.

ASSIGNMENT OF ERRORS MUST SPECIFY PARTICULAR ERRORS. See STATEMENT, 4.

ESMERALDA COUNTY.

ESMERALDA COUNTY REDEMPTION-FUND ACTS NOT UNCONSTITUTIONAL. See CONSTITUTION, 1.

CHARACTER OF ESMERALDA COUNTY REDEMPTION-FUND ACTS. See STATUTES 4, 7.

ESTOPPEL.

PENDENCY OF EJECTMENT DOES NOT ESTOP PLAINTIFF FROM CLAIMING ADVERSE POSSESSION. See LIMITATIONS, 3.

EVIDENCE.

1. EVIDENCE—MORAL CERTAINTY. Moral certainty, as distinguished from mathematical certainty beyond the possibility of a doubt, is all that the law ever requires in order to establish a fact beyond a reasonable doubt to the satisfaction of a jury. *State v. Ferguson*, 106.
2. CRIMINAL LAW—DECLARATIONS OF DEFENDANT—RES GESTÆ. In a criminal case, to make the declarations of defendant admissible evidence in his favor, it must appear that they constituted parts of the *res gestæ*. *State v. Ferguson*, 106.
3. EFFECT TO BE GIVEN DEFENDANT'S OWN TESTIMONY. In a criminal case the jury has the right to believe such portions of defendant's own testimony as they consider true, and to disbelieve such portions as they consider false: his testimony, like that of other witnesses, is to be weighed and determined by the jury from all the surrounding circumstances of the case. *State v. Stewart*, 120.
4. WRITTEN INSTRUMENT NOT TO BE VARIED BY PAROL. Oral testimony, offered with evident intention of varying and controlling the plain terms of a written instrument, and not to establish an equity superior to the writing, is not admissible. *Menziez v. Kennedy*, 152.

5. **EXCLUSION OF EVIDENCE AFTERWARDS ADMITTED.** The exclusion of testimony at one stage of a trial cannot be availed of as error, if it appear that afterwards the desired evidence all came in. *Menzies v. Kennedy*, 152.
6. **ARSON—EVIDENCE OF OVER-INSURANCE TO SHOW MOTIVE.** In a criminal prosecution for arson in the second degree under section 57 of the Crimes Act, where the testimony was all circumstantial: *Held*, that evidence of an over-large insurance upon the goods of the accused destroyed by the fire was entirely competent as tending to show a possible or probable motive—such motive being a material link in the chain of circumstances. *State v. Cohn*, 179.
7. **MOTIVE AS A CIRCUMSTANCE OF EVIDENCE.** Motive does not of itself prove guilt; nor on the other hand is the prosecution bound to conclusive proof of guilt before motive can be considered; but motive is a unit contributing to make up the sum total of proof. *State v. Cohn*, 179.
8. **ARSON—WHEN INSURANCE MAY BE PROVED BY PAROL.** When, in a prosecution for arson, the fact of a belief on the part of the accused that he was over-insured became material, as tending to show a motive and thus making an important link in the chain of circumstances: *Held*, that the place and amount of such insurance might be proved by parol, without producing the policy of insurance. *State v. Cohn*, 179.
9. **FIRE ALONG LINE OF RAILROAD—PRESUMPTIONS—BURDEN OF PROOF.** If one or more of the locomotives of a railroad company drop coals or emit sparks just prior to or soon after property on the line of its track has been destroyed by fire, without any other known cause or circumstance of suspicion, it becomes incumbent upon the company, in an action for damages caused by such fire, to show that their engines were not the cause of it. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
10. **IRRELEVANCY OF TESTIMONY ON ACCOUNT OF REMOTENESS.** In an action against a railroad for negligence in setting fire to cord-wood: *Held*, that the fact of a fire having occurred in the wood-yard previous to the building of the railroad was entirely irrelevant. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
11. **CORROBORATING TESTIMONY, WHAT.** Testimony tending to connect accused with the offense charged, such as proof of the possession of the subject of a larceny, is sufficient to corroborate the direct testimony of an accomplice. *State v. Lambert*, 321.
12. **DYING DECLARATIONS, WHAT ARE ADMISSIBLE.** Dying declarations, which may properly be admitted, are such as touch upon the cause of, or circumstances surrounding, the approaching death. *State v. Murphy*, 394.

13. OBJECTION OF "HEARSAY" TO DYING DECLARATIONS NOT AVAILABLE. A general objection to the introduction of dying declarations that they are hearsay, is not available, as all evidence of dying declarations must necessarily be hearsay. *State v. Murphy*, 394.
14. FOUNDATION FOR INTRODUCTION OF DYING DECLARATIONS. It is sufficient foundation for the introduction of dying declarations to show that they were made the day before the death of deceased and that at the time of making them he was in expectation of death from the effects of his wound. *State v. Murphy*, 394.
15. OBJECTIONS TO EVIDENCE SHOULD STATE POINT OF EXCEPTION. Where in a murder case a witness was asked to testify as to the dying declarations of deceased; and it was objected to such proposed evidence that it was hearsay and that no proper foundation had been laid: *Held*, that the objection was not specific enough to cover the point that the declarations did not touch the cause of, or circumstances surrounding, the approaching death. *State v. Murphy*, 394.
16. NO ERROR IN ADMISSION OF UNPREJUDICIAL TESTIMONY, THOUGH IRRELEVANT. Where in a murder case testimony was admitted as to what purported to be dying declarations; but it also appeared in proof that defendant had made a confession which warranted a conviction: *Held*, that though the declarations may have been irrelevant, the testimony could not have prejudiced defendant. *State v. Murphy*, 394.

DUE BILLS SIGNED BY SUPERINTENDENT OF MINING COMPANY. See AGENCY, 1.

STATING TO JURY A FACT NOT CONTROVERTED. See CHARGE, 6.

RECOVERY OF SUBSCRIPTION — MUTUALITY BETWEEN PARTIES. See CONTRACTS, 2.

CRIMINAL TRIALS — DEPARTURE FROM ORDER OF PROOF — DISCRETION. See CRIMINAL LAW, 8.

PROSECUTION CANNOT MAKE ACCUSED ITS OWN WITNESS. See CRIMINAL LAW, 14.

CRIMINAL LAW — AFFIDAVIT FOR CONTINUANCE. See CRIMINAL LAW, 19.

CRIMINAL LAW — SUPPLYING PROOF OF VENUE AFTER PROSECUTION RESTS. See CRIMINAL LAW, 22.

KIND OF POSSESSION NECESSARY TO MAINTAIN EJECTMENT. See EJECTMENT.

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- FINDINGS, WHEN ATTACKABLE AS AGAINST EVIDENCE. See FINDINGS, 1.
- REFUSAL TO APPOINT GUARDIAN—PRESUMPTION IN ABSENCE OF EVIDENCE.
See GUARDIANSHIP, 2.
- INTEREST ON BALANCE OF ACCOUNT—BALANCE ASCERTAINED BY PLEADING.
See INTEREST.
- MURDER—PROOF BY EXPERTS OF MORTAL CHARACTER OF WOUND NOT INDISPENSABLE. See MURDER, 5.
- QUESTION OF NEGLIGENCE—RELEVANCY OF EVIDENCE OF SUBSEQUENT NEGLIGENCE. See NEGLIGENCE, 1.
- NO NEW TRIAL FOR INSUFFICIENCY WHEN EVIDENCE NOT ALL BEFORE COURT.
See NEW TRIAL, 1, 2.
- WEIGHT OF EVIDENCE ON MOTION FOR NEW TRIAL AND ON APPEAL. See NEW TRIAL, 4.
- ADMISSION BY PLEADING—SETTING UP OF COUNTER CLAIM. See PLEADING, 8.
- ADMISSION OF VALUE OF GOODS SOLD AND DELIVERED—DRAYAGE ITEMS.
See PRACTICE, 2.
- ACTION TO QUIET TITLE—PRIMA FACIE CASE FOR PLAINTIFF—BURDEN OF PROOF. See QUIETING TITLE, 1.
- FIRES CAUSED BY LOCOMOTIVES—RELEVANCY OF EVIDENCE OF PREVIOUS FIRES. See RAILROADS, 1.
- NEW TRIAL STATEMENT SHOULD AFFIRMATIVELY SHOW ALL THE EVIDENCE.
See STATEMENT, 1, 3.
- TAXES—RECEIPT FOR LESS AMOUNT NOT EVIDENCE OF PAYMENT IN FULL.
See TAXES, 1.
- IMPEACHMENT OF WITNESS—GENERAL MORAL CHARACTER NOT IN ISSUE. See WITNESS, 1.
- EXTENT OF CROSS-EXAMINATION OF ACCUSED. See WITNESS, 2.
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EXCEPTIONS.

OBJECTIONS TO RULINGS AT TRIAL TO BE ASSIGNED AS ERRORS. See APPEAL, 1.

WHAT OBJECTIONS NOT AVAILABLE ON APPEAL IF NOT TAKEN BELOW. See APPEAL, 3.

OBJECTIONS TO EVIDENCE SHOULD STATE POINT OF EXCEPTION. See EVIDENCE, 13, 15.

FINDINGS.

1. FINDINGS, WHEN ATTACKABLE AS AGAINST EVIDENCE. A motion for new trial on the ground that the evidence is insufficient to justify the findings, based upon the alleged existence of a proven fact not noticed in the findings, cannot be sustained, unless it appear that the complaining party requested a finding upon the subject. *Warren v. Quill*, 259.

2. OMISSION IN FINDINGS OF FACTS OF DEFENSE. Where certain facts have been found which are warranted by the evidence, but there is an omission to find on an issue of fact essential to the determination of the rights of the losing party, such party should except to the findings as defective and point out the issue upon which he desires a finding; and if he fails to do so the judgment will not be reviewed. *Warren v. Quill*, 259.

FACT NOT PROPERLY PLEADED NOT PROPERLY FOUND. See PLEADING, 5.

FRAUD.

CONTRACT VOID UNDER STATUTE OF FRAUDS. See CONTRACTS, 3.

FUNDS.

ESMERALDA COUNTY REDEMPTION-FUND ACTS NOT UNCONSTITUTIONAL. See CONSTITUTION, 1.

CHARACTER OF ESMERALDA REDEMPTION-FUND ACTS. See STATUTES, 4, 7, 8.

GAMING.

VIOLATION OF "LORD'S DAY" ACT OF 1861—QUESTIONS ON HABEAS CORPUS. See SUNDAY LAW.

GARNISHMENT.

ORDER ON PROCEEDINGS AGAINST GARNISHEE NOT REVIEWABLE ON CERTIORARI. See ATTACHMENT, 2.

GIFT CONCERT.

[See LOTTERY.]

GRAND JURY.

1. EXCUSING GRAND JUROR BY MISTAKE AND RECALLING HIM. Where a grand juror was inadvertently told by the judge that he was excused, but before any order excusing him was entered, the mistake was corrected and he was recalled and participated in the proceedings: *Held*, that the court had the undoubted right to correct the mistake. *State v. Cohn*, 179.
2. RIGHT TO TRAVERSE CHALLENGE TO GRAND JUROR AFTER WAIVER OF TRAVERSE. Where a grand juror was challenged by an accused person and the district attorney waived the right to traverse it; and the court ordered the juror not to be present at any consideration of the charges against accused; but, it afterwards appearing that he had inadvertently been present for a few minutes, the district attorney was allowed to call the grand jury into court and then traverse the challenge and show it to be groundless: *Held*, that it was within the discretion of the court to allow the district attorney to traverse the challenge after he had originally waived it. *State v. Cohn*, 179.

GUARDIANSHIP.

1. IRREGULARITY IN APPOINTMENT OF GUARDIAN—WANT OF NOTICE TO FRIENDS. The appointment of a stranger as guardian of the person and estate of an infant within three days after petition and without notice to the infant's relatives or the persons having its custody, is gravely irregular. *Matter of Mary Winkleman*, 303.
2. REFUSAL TO APPOINT GUARDIAN—PRESUMPTION IN ABSENCE OF EVIDENCE. Where a transcript on appeal from an order refusing to appoint a person guardian on the ground of his unfitness failed to contain all the evidence: *Held*, that in the absence of the evidence, undisclosed testimony influencing the decision would be presumed. *Matter of Mary Winkleman*, 303.

HABEAS CORPUS.

1. **HABEAS CORPUS—COMMITMENT BY JUSTICE OF THE PEACE.** A person held in custody under a regular commitment of a justice of the peace will not be discharged on habeas corpus, unless it appears that the jurisdiction of the justice has been exceeded or that the commitment issued without authority of any judgment, order or decree of any court or any provision of law. *Ex Parte Winston*, 71.
2. **JURISDICTION ON HABEAS CORPUS NOT APPELLATE.** A habeas corpus is not a writ of error, nor can it be used to authorize the exercise of appellate jurisdiction. *Ex Parte Winston*, 71.
3. **WHAT WILL BE LOOKED INTO ON HABEAS CORPUS.** On habeas corpus, in case of a commitment under the judgment of a court such judgment cannot be disregarded; nor will the record be looked into except to ascertain whether a judgment exists, without regard to the question whether it be right or wrong. *Ex Parte Winston*, 71.

UNCERTAINTY IN SENTENCE. See CRIMINAL LAW, 2.

VIOLATION OF "LORD'S DAY" ACT OF 1861—QUESTIONS ON HABEAS CORPUS;
See SUNDAY LAW.

INDICTMENT.

1. **MURDER—SUFFICIENCY OF INDICTMENT.** An indictment for murder, charging that defendant at a certain time and place without authority of law and with malice aforethought did shoot deceased with a pistol and from the wounds produced from the shooting deceased died, though imperfect in form and objectionable on special demurrer, is not imperfect in substance and, if not specially demurred to, is cured by verdict. *State v. Harrington*, 91.
2. **INDICTMENT—MISSTATEMENT OF LEGAL APPELLATION OF CRIME.** Where, after the amendment of the crimes act, substituting "assault with intent to kill" (Stats. 1873, 119) for "assault with intent to commit murder" (Stats. 1861, 64), an indictment designated the offense charged as an "assault with intent to commit murder," and specially charged an assault "with intent to kill and murder," and the accused was convicted of "assault with a deadly weapon with intent to inflict a bodily injury": *Held*, that the failure to state the legal appellation of the crime in the charging portion of the indictment was a defect of form, and no objection having been taken by demurrer, could not have prejudiced the defendant. *State v. Johnson*, 175.

3. OBJECTION TO INDICTMENT FOR CHARGING TWO OFFENSES—DEMURRER. An objection to an indictment, that it charges more than one offense, should be taken by special demurrer. *State v. Johnson*, 175.

ASSAULT WITH INTENT TO "KILL AND MURDER"—SURPLUSAGE. See ASSAULT.

PENDENCY OF ANOTHER INDICTMENT NOT MATTER IN ABATEMENT. See CRIMINAL LAW, 20.

FAILURE TO INDICT AT NEXT TERM. See CRIMINAL LAW, 21.

INJUNCTION.

1. INJUNCTION, WHEN TO BE DISSOLVED—DENIAL OF EQUITIES. An injunction granted upon a complaint, the allegations of which have been fully and fairly denied by the answer, should on motion and in the absence of further showing be dissolved, unless in exceptional cases when good reason appears for continuing it. *Magnet M. Co. v. Page and Panaca S. M. Co.*, 346.
2. MOTION TO DISSOLVE INJUNCTION ON COMPLAINT AND ANSWER. On a motion to dissolve an injunction, heard upon complaint and answer alone, the full and fair denials of the answer are taken as true. *Magnet M. Co. v. Page and Panaca S. M. Co.*, 346.

REMEDIES AGAINST JUSTICES' JUDGMENTS. See JUSTICE OF THE PEACE, 1.

INSURANCE.

ARSON—EVIDENCE OF OVER-INSURANCE TO SHOW MOTIVE. See EVIDENCE, 6.

ARSON—WHEN INSURANCE MAY BE PROVED BY PAROL. See EVIDENCE, 8.

INTEREST.

INTEREST ON BALANCE OF ACCOUNT—BALANCE ASCERTAINED BY PLEADING. Where an answer admitted an account for goods sold and delivered: *Held*, that such answer amounted to an ascertainment of the balance of account and that under the statute (Comp. Laws, Sec. 32) interest was due from that time upon such balance. *Skinker v. Clute*, 342.

JUDGMENT.

1. VOID JUDGMENT VOID AB INITIO. Where on appeal a conviction for crime is adjudged void, it is not the decision of the Supreme Court that makes it void; it is void *ab initio*. *Ex parte Roberts*, 44.

2. JUDGMENT RENDERED OUT OF TERM VOID. A judgment rendered at a time and place other than those appointed by law, is no judgment; it is not merely erroneous; it is void. *Dalton v. Libby and Lamburth*, 192.

CRIMINAL LAW—UNCERTAINTY IN SENTENCE. See CRIMINAL LAW, 2.

FIXING TIME OF EXECUTION NOT PART OF JUDGMENT IN CAPITAL CASE. See CRIMINAL LAW, 17, 18.

REMEDY IN EQUITY TO SET ASIDE VOID JUDGMENT. See EQUITY, 1, 2.

OMISSION IN FINDINGS OF FACTS OF DEFENSE. See FINDINGS, 2.

WHAT WILL BE LOOKED INTO ON HABEAS CORPUS. See HABEAS CORPUS, 3.

REMEDIES AGAINST JUSTICES' JUDGMENTS. See JUSTICE OF THE PEACE, 1.

ACTION OF JUSTICE WITHOUT JURISDICTION VOID. See JUSTICE OF THE PEACE, 4.

JUDGMENT UNDER "LORD'S DAY" ACT OF 1861. See SUNDAY LAW.

JURISDICTION.

1. ACT AUTHORIZING LOTTERY—CONSTRUCTION OF STATUTES EXCLUSIVELY A JUDICIAL POWER. Where a statute provided for gift concerts and distribution of prizes among ticket holders by raffle, and specially provided that "nothing in this act contained shall be construed as authorizing a lottery in this State or as allowing the sale of lottery tickets contrary to the provisions of the constitution" (Stats. 1871, 110): *Held*, that the construction of such act was for the courts alone and that the attempted exercise of this power by the legislature was an unconstitutional assumption of the functions of the judiciary. *Ex parte Blanchard*, 101.
2. REMOVAL OF SUIT TO FEDERAL COURT—JUDICIARY ACT OF 1789. To remove a suit from a state court to the United States circuit court under the judiciary act of congress of 1789 (1 U. S. Stats. 73, Sec. 12,) the application must be made by defendant at the time of entering his appearance in the state court; and if not then made, it will be too late. *Davis v. Cook*, 134.
3. REMOVAL OF SUIT UNDER ACT OF CONGRESS OF JULY 27, 1866. The act of congress of July 27, 1866, in reference to the removal of cases from state to federal courts (14 U. S. Stats. 306,) contemplates the case wherein a citizen of the state in which the suit is brought is or shall be a defendant, and has no application to a case where one defendant is an alien and the others are citizens of another state. *Davis v. Cook*, 134.

4. REMOVAL OF SUIT UNDER ACT OF CONGRESS OF MARCH 2, 1867. The act of congress of March 2, 1867, in reference to the removal of cases from state to federal courts (14 U. S. Stats. 558,) extends the right of removal to the plaintiff as well as to the defendant, when from prejudice or local influence either party reasonably believes he cannot obtain justice in the state court ; but its phraseology excludes suits in which an alien may be a party. *Davis v. Cook*, 134.
5. REMOVAL OF CASE TO FEDERAL COURT BY PART OF DEFENDANTS. If a suit be brought in a state court by a citizen against several joint debtors, and the only defendants served are not citizens, such defendants have the right to remove their case to a federal court, though their co-defendant do not join in the application. *Davis v. Cook*, 134.
6. PROCEEDINGS OF DISTRICT COURT BEYOND ITS JURISDICTION TO BE ANNULLED. Where on appeal from a justice's court the defendant was allowed in the district court to file an answer, presenting an issue which could not have been tried in the justice's court and obtained judgment thereon : *Held*, That the district court exceeded its jurisdiction, and that its proceedings and judgment should be annulled. *State ex rel. Harding v. Moor*, 355.
7. JURISDICTION OF JUSTICES—PRACTICE ACT, SECTIONS 511 AND 30. Sections 511 and 30 of the Practice Act are to be construed together as parts of the same statute relating to the same general subject of jurisdiction ; the former being evidently intended to cover residents of the State, while the latter was intended to reach non-residents. *Roy v. Whitford*, 370.

ORDER ON PROCEEDINGS AGAINST GARNISHEE NOT REVIEWABLE ON CERTIORARI. See ATTACHMENT, 2.

POWERS OF COUNTY COMMISSIONERS SPECIAL AND LIMITED. See COUNTY COMMISSIONERS, 2.

JURISDICTION ON HABEAS CORPUS NOT APPELLATE. See HABEAS CORPUS, 2.

JUDGMENT RENDERED OUT OF TERM VOID. See JUDGMENT, 2.

ACTION OF JUSTICE WITHOUT JURISDICTION VOID—CERTIORARI. See JUSTICE OF THE PEACE, 4.

ACTS OF CONGRESS RELATING TO MINING CLAIMS—JURISDICTION OF STATE COURTS. See MINES.

JURISDICTION OF JUSTICE UNDER "LORD'S DAY" ACT. See SUNDAY LAW.

JURY.

1. SEPARATION OF JURY WITHOUT OBJECTION. Where on the trial of a civil case the court, in the presence of the parties and their attorneys and without objection from any one, allowed the jury to separate during recess: *Held*, that the consent of all parties must be implied and that, in the absence of any showing of harm, the verdict would not be disturbed. *Menzies v. Kennedy*, 152.
 2. ACT ESTABLISHING BOUNDS AND EXEMPTING JURORS NOT UNCONSTITUTIONAL. Where in a criminal case it was objected that the accused was unconstitutionally deprived of a common law jury by operation of the act allowing bounds to be fixed by judges and exempting persons residing outside thereof from jury duty on the payment of \$25, (Stats. 1873, 128): *Held*, that, however pernicious the system adopted might be, it was still but an exercise of a legitimate legislative power of exemption and therefore not unconstitutional. *State v. Cohn*, 179.
- EFFECT TO BE GIVEN DEFENDANT'S OWN TESTIMONY. See EVIDENCE, 3.
- EXCUSING GRAND JUROR BY MISTAKE AND RECALLING HIM. See GRAND JURY, 1.
- RIGHT TO TRAVERSE CHALLENGE TO GRAND JUROR AFTER WAIVER OF TRAVERSE. See GRAND JURY, 2.
- IMPEACHMENT OF VERDICT BY JUROR. See VERDICT, 1.
- RECOMMENDATION TO MERCY NO PART OF VERDICT. See VERDICT, 2.
- INTOXICATION OF JUROR AVOIDS VERDICT. See VERDICT, 3.

JUSTICE OF THE PEACE.

1. REMEDIES AGAINST JUSTICES' JUDGMENTS—WHEN EQUITY WILL NOT INTERFERE. If a judgment for plaintiff by a justice of the peace is erroneous, the remedy of defendant is by appeal; if void, the execution upon it may be set aside by motion; if both these remedies are lost without fault, it must still appear that defendant has no other adequate and complete remedy at law before equity will restrain the enforcement of the execution. *Connery v. Swift*, 39.
2. JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE.—As a district court on appeal from a justice has exactly the same jurisdiction as the justice, a plea cannot be considered in the district court on such appeal, which could not have been considered in the justice's court. *State ex rel. Harding v. Moor*, 355.

3. JURISDICTION OF JUSTICE OF THE PEACE OVER NON-RESIDENTS. Section 30 of the Practice Act, providing for service of summons upon non-resident defendants, applies to cases in justices' courts; but the precise method of acquiring jurisdiction prescribed by law must be pursued. *Roy v. Whitford*, 370.
4. ACTION OF JUSTICE WITHOUT JURISDICTION VOID—CERTIORARI. If a judgment be rendered by a justice of the peace in a case in which he has acquired no jurisdiction, his action is void; and, where there is no other plain, speedy and adequate remedy, it will be annulled on certiorari. *Roy v. Whitford*, 370.

HABEAS CORPUS—COMMITMENT BY JUSTICE OF THE PEACE. See HABEAS CORPUS, 1.

LAND.

PRACTICE IN CASES OF CONTEST FOR PUBLIC LAND. See NEW TRIAL, 3.

OCCASIONAL ACTS OF OWNERSHIP NOT ACTUAL, BONA FIDE POSSESSION. See POSSESSION, 1.

FORCIBLE POSSESSION—NO INFERENCE OF HOLDING AS TENANT IN COMMON WITH PERSON OUSTED. See POSSESSION, 2.

OCCUPATION OF TIMBER LAND. See POSSESSION, 3.

IMPROVEMENTS IN GOOD FAITH AS SET-OFF TO RENTS AND PROFITS. See SET-OFF.

LARCENY.

1. NO LARCENY WITHOUT ACT AS WELL AS INTENT. Mere possession of another's property, with intent to steal it, is no larceny, until intent is ripened into act. *State v. Newman*, 48.
2. DISTINCT LARCENIES AT SAME TIME AND PLACE. The stealing of the property of different persons at the same time and place and by the same act, may be prosecuted at the pleasure of the government as one offense or as several distinct offenses. *State v. Lambert*, 321.

LARCENY OF PROPERTY STOLEN IN AND BROUGHT FROM ANOTHER STATE. See CRIMINAL LAW, 3, 4.

LEGISLATURE.

CONSTRUCTION OF STATUTES EXCLUSIVELY A JUDICIAL POWER. See JURISDICTION, 1.

LEGISLATIVE CONTROL OVER REVENUES TO BE RAISED. See TAXES, 4.

LIMITATIONS.

1. STATUTE OF LIMITATIONS—ACTION ON MORTGAGE WHERE REMEDY ON DEBT BARRED. Where money is loaned without note or writing and a mortgage is given to secure its repayment, though the statute of limitations may run against an action on the debt in two years, it does not run against a foreclosure of the mortgage in less than four years. *Cookes v. Culbertson*, 199.
2. STATUTE OF LIMITATIONS AS TO MINING CLAIMS. The act of congress of 1872, in relation to the location of mining claims and the determination of the right thereto in case of conflict (U. S. Stats. 1872, 91, Sec. 7), does not prevent the application of the state statute of limitations: on the contrary, an actual, exclusive and uninterrupted adverse possession for the statutory period constitutes a complete bar. *The 420 M. Co. v. Bullion M. Co.*, 240.
3. PENDENCY OF EJECTMENT DOES NOT ESTOP PLAINTIFF FROM CLAIMING ADVERSE POSSESSION. The pendency of a suit to recover possession of real estate does not estop the plaintiff, in case of a suit subsequently commenced against himself, from setting up the statute of limitations and claiming rights and privileges under it. *The 420 M. Co. v. Bullion M. Co.*, 240.

LIQUOR.

INTOXICATION OF JUROR AVOIDS VERDICT. See VERDICT, 3.

LOTTERY.

1. GIFT CONCERT ACT UNCONSTITUTIONAL. The act of March 3, 1861, to aid the Nevada Benevolent Association in providing means to erect an insane asylum (Stats. 1871, 110,) in so far as it authorized a lottery or allowed the sale of lottery tickets in this State, was unconstitutional. *Ex Parte Blanchard*, 101.
2. LOTTERIES PUBLIC NUISANCES. The English statute of 10 and 11 W. III, c. 17, declaring lotteries to be public nuisances, constitutes a part of the common law of the United States, and was so understood by the framers of our con-

stitution when they provided that "no lottery shall be authorized by this State." *Ex Parte Blanchard*, 101.

3. GIFT CONCERT TICKETS LOTTERY TICKETS. Where a person was convicted of selling lottery tickets contrary to the act of March 7, 1873, prohibiting lotteries (Stats. 1873, 186); and the fact appeared to be that he had sold tickets to a gift concert under the act of March 3, 1871, in aid of the Nevada Benevolent Association (Stats. 1871, 110): *Held*, on habeas corpus, that the act of 1871, being unconstitutional as sanctioning a lottery, afforded no protection. *Ex Parte Blanchard*, 101.

MANDAMUS.

MANDAMUS IMPROPER WHERE EJECTMENT AFFORDS FULL REMEDY. In a case where ejectment affords a plain, speedy and adequate remedy, as where county commissioners desire to eject a county officer from a room in the court house, mandamus can not be maintained. *Washoe County Commissioners v. Halch*, 357.

MARKS AND BRANDS.

PROVISION RELATING TO KILLING OF STOCK IN MARKS AND BRANDS STATUTE UNCONSTITUTIONAL. The provision in relation to the unlawful killing of stock and making it a felony, contained in the statute regulating marks and brands (Stats. 1873, 99, Sec. 10,) bears no proper relation to the subject of the statute as expressed in the title, and is therefore unconstitutional. *State v. Silver*, 227.

MINES.

ACTS OF CONGRESS RELATING TO MINING CLAIMS — JURISDICTION OF STATE COURTS. The object of the acts of congress of July 26, 1868, July 9, 1870, and May 10, 1872, in relation to the location of mining claims, was not to confer any additional jurisdiction upon the state courts, but to require parties protesting against the issuance of a patent to try the right of possession and have the controversy determined in the state courts by the same rules, and governed by the same principles, and controlled by the same statutes, that apply in other cases. *The 420 M. Co. v. Bullion M. Co.*, 240.

DUE BILLS SIGNED BY SUPERINTENDENT OF MINING COMPANY. See AGENCY, 1.

BY-LAWS OF MINING COMPANY, ADOPTION BY LONG USE. See CORPORATIONS, 2.

MINING COMPANY ELECTIONS. See CORPORATIONS, 3, 4.

STATUTE OF LIMITATIONS AS TO MINING CLAIMS. See LIMITATIONS, 2.

STOCK IN CALIFORNIA MINING COMPANY, NOT NEGOTIABLE. See STOCK.

MORTGAGE.

1. MORTGAGEE IN POSSESSION TO ACCOUNT FOR RENTS AND PROFITS. Where the circumstances show that a person in possession of real estate under a deed absolute on its face holds it in fact only as security for a debt, he will be compelled to account for the rents and profits. *Cookes v. Culbertson*, 199.
2. IMPROVEMENTS BY MORTGAGEE IN POSSESSION. A mortgagee in possession is entitled to allowance for necessary and proper repairs, but he will not be credited with costly improvements, though the value of the estate be increased thereby, unless made with the mortgagor's consent. *Cookes v. Culbertson*, 199.

STATUTE OF LIMITATIONS—ACTION ON MORTGAGE WHERE REMEDY ON DEBT BARRED. See LIMITATIONS, 1.

MOTION.

MOTION TO DISSOLVE INJUNCTION. See INJUNCTION, 1, 2.

MURDER.

1. JUSTIFICATION OF HOMICIDE—WHEN "UNAVOIDABLE NECESSITY" REQUIRED. Where in case of a homicide, claimed to have been committed in self-defense, the court charged that "To justify the homicide it must appear there was an unavoidable necessity:" *Held*, that this was very different from the language of the statute that "Justifiable homicide may also consist in unavoidable necessity" (Crim. Pr. Act, Sec. 29) and a perversion of its sense. *State v. Ferguson*, 106.
2. MURDER—PHYSICAL DISABILITY OF ACCUSED. Where in a murder case defendant asked an instruction that "If defendant was, at the time of the alleged homicide, laboring under great physical disability, such as to render him unable to cope with deceased in a fight where weapons were not used, the defendant had a right to use any means in his power to protect himself if attacked:" *Held*, clearly wrong, as it would give a person when attacked the right to take the life of his assailant, without reference to the fact whether or not the circumstances of the assault were sufficient to excite the fears of a reasonable person that he was in danger of his life or of receiving great bodily harm. *State v. Ferguson*, 106.

3. WHEN HOMICIDE JUSTIFIABLE—SELF-DEFENSE. In order to justify a homicide, claimed to have been committed in self-defense, it must appear that to defendant's comprehension, as a reasonable man, he was actually in danger of his life or of great bodily harm, and that to avoid such danger it was absolutely necessary for him to take the life of deceased. *State v. Ferguson*, 106.
4. MERE THREATS WILL NOT JUSTIFY HOMICIDE. Mere threats, unaccompanied by some demonstration of hostility, from which the accused might reasonably infer the intention of their execution by deceased, will not justify homicide. *State v. Stewart*, 120.
5. MURDER—PROOF BY EXPERTS OF MORTAL CHARACTER OF WOUND NOT INDISPENSABLE. In a murder case, when the proof was that deceased was a strong and apparently healthy man; that he was wounded by a pistol shot fired by defendant; that he immediately took to his bed; suffered intensely for two days and then died; and it was objected there was no proof by experts that the wound was dangerous or mortal or caused the death: *Held*, that the evidence of experts was not indispensable and that the proof as it stood was sufficient to go to the jury and, in the absence of showing to the contrary, justified a verdict against defendant. *State v. Murphy*, 394.

CRIMES ACT, SEC. 26, AS AN INSTRUCTION. 'See CHARGE, 3.

ASSAULT WITH INTENT TO COMMIT MURDER. See CRIMINAL LAW, 1.

MURDER—WHEN THREATS AVAILABLE IN DEFENSE. See CRIMINAL LAW, 5, 6.

TIME FOR "IRRESISTIBLE PASSION" TO COOL. See CRIMINAL LAW, 7.

QUESTION OF JUSTIFIABLE HOMICIDE. See CRIMINAL LAW, 9, 10.

THE LAW OF SELF-DEFENSE. See CRIMINAL LAW, 12.

FIXING TIME OF EXECUTION NOT PART OF JUDGMENT IN CAPITAL CASE. See CRIMINAL LAW, 17.

MEANING OF "MALICE AFORETHOUGHT." See DEFINITIONS, 1.

DYING DECLARATIONS, WHAT ARE ADMISSIBLE. See EVIDENCE, 12, 13, 14.

MURDER—SUFFICIENCY OF INDICTMENT. See INDICTMENT, 1.

PRESUMPTION FROM USE OF DEADLY WEAPON. See PRESUMPTION, 1.

NEGLIGENCE.

1. QUESTION OF NEGLIGENCE—RELEVANCY OF EVIDENCE OF SUBSEQUENT NEGLIGENCE. In an action against a railroad company for negligently setting fire to cord-wood by coals dropped or sparks emitted from a locomotive, a witness was allowed to testify that a few weeks after the fire complained of another fire was caused on the same road by coals dropped from another engine of the same company: *Held*, competent evidence. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
2. NEGLIGENCE OF RAILROAD IN CAUSING FIRE IN WOOD-YARD, WHAT. In an action against a railroad for setting fire by its locomotive to plaintiff's wood-yard, the court charged the jury that if they believed that a locomotive, if properly constructed and skillfully managed, would not set fire to wood piled on the side of the track; and if they further believed that the plaintiff's wood was destroyed by fire or sparks from defendant's engine, without plaintiff's fault, they should find for plaintiff: *Held*, no error. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
3. USE OF DANGEROUS AGENTS—CARE IN PROPORTION TO DANGER. As a person employing a dangerous agent is obliged to use care in proportion to the danger of such agent, a railroad is required to use a greater amount of care where property near its track is from its nature more likely to be destroyed. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
4. WHAT CONTRIBUTORY NEGLIGENCE OF PLAINTIFF WILL RELIEVE DEFENDANT. The rule of law, which releases a defendant from responsibility for damages caused by his negligence when there is contributory negligence on the part of the plaintiff, is limited to cases where the act or omission of plaintiff was the *proximate* cause of the injury. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
5. RIGHT TO USE DESTRUCTIVE AGENT TO BE "CAREFULLY LIMITED." Where, in an action against a railroad company for damages occasioned by setting fire to a wood-yard, the court instructed the jury that the exercise, employment and use by the railroad of the dangerous and destructive element of fire, to which it had a right, should be carefully limited with just regard to the rights of others: *Held*, no error. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.

"IMMEDIATE" AND "PROXIMATE" CAUSE THE SAME. See DEFINITIONS, 2.

RAILROAD BOUND TO USE BEST KNOWN APPLIANCES TO PREVENT INJURY.
See RAILROAD, 2, 4.

NEW TRIAL.

1. NO NEW TRIAL FOR INSUFFICIENCY WHEN EVIDENCE NOT ALL BEFORE COURT. Orders denying motions for new trial on the ground of insufficiency of evidence, made upon statements failing to expressly show that all the evidence was before the court, have been uniformly affirmed. *Libby v. Dalton*, 23.
2. NEW TRIAL FOR INSUFFICIENCY, GRANTED ON DEFECTIVE STATEMENT, WILL BE REVERSED. When the statement upon motion for new trial is the only statement used on appeal, the appellate court stands on the same plane as the court below in reviewing the evidence; and if, in a case where the statement fails to show that it contains all the evidence, a new trial has been granted on the ground of insufficiency of evidence, it will be reversed. *Libby v. Dalton*, 23.
3. PRACTICE IN CASES OF CONTEST FOR PUBLIC LAND. Cases of contest for public land under the act of March 4, 1871, being governed by the provisions of the Practice Act so far as applicable (Stats. 1871, 135, Sec. 12), a statement on motion for new trial in such case, which contains no specifications of error, is insufficient. *Neil v. Wynecoop*, 46.
4. WEIGHT OF EVIDENCE ON MOTION FOR NEW TRIAL AND ON APPEAL. A nisi prius court ought not to grant a new trial, where there is conflicting evidence, except the weight of evidence clearly preponderates against the verdict; but when such court does grant a new trial, the appellate court will not interfere unless the weight of evidence clearly preponderates against the ruling of the court. *Treadway v. Wilder*, 67.
5. IDENTIFICATION OF AFFIDAVITS USED ON MOTION FOR NEW TRIAL. To entitle affidavits, used on motion for new trial, to be considered on appeal in the Supreme Court, they must be identified by indorsement of the judge or clerk, made "at the time" of use; and a certificate, made after appeal taken, will not avail. *Dean v. Pritchard*, 232.
6. NEW TRIAL ORDER REVERSED, IF NOT SUPPORTED. On appeal from an order granting a new trial, if the affidavits upon which it was granted are not identified so as to entitle them to be considered, the order, having no foundation, will be reversed. *Dean v. Pritchard*, 232.
7. NOTICE OF MOTION FOR NEW TRIAL, WITHOUT SPECIFYING GROUNDS, INSUFFICIENT. A notice of motion for new trial, which fails to designate the grounds upon which the motion will be made, is insufficient. *Street v. Lemon Mill and M. Co.*, 251.

8. DEFECTIVE NOTICE FOR NEW TRIAL NOT HELPED BY STATEMENT. The language of section 197 of the Practice Act, requiring a notice of motion for new trial to "designate generally the grounds upon which the motion will be made," is clear, plain and explicit; and a disregard of it is not helped out by designating the grounds in the statement. *Street v. Lemon Mill and M. Co.*, 251.

CRIMINAL LAW—APPEAL FROM NEW TRIAL ORDER TOO LATE AFTER APPEAL FROM JUDGMENT DISPOSED OF. See APPEAL, 4.

FINDINGS, WHEN ATTACKABLE AS AGAINST EVIDENCE. See FINDINGS, 1.

NEW TRIAL STATEMENT CANNOT BE CERTIFIED AFTER APPEAL. See STATEMENT, 2.

NEW TRIAL STATEMENT FOR INSUFFICIENCY OF EVIDENCE SHOULD SHOW ALL THE EVIDENCE. See STATEMENT, 3.

NOTES.

DUE BILLS SIGNED BY SUPERINTENDENT OF MINING COMPANY. See AGENCY, 1.

TAKING NOTE IN NAME OF FIRM FOR INDIVIDUAL DEBT WITH FULL KNOWLEDGE. See PARTNERSHIP, 2.

NOTICE.

IRREGULARITY IN APPOINTMENT OF GUARDIAN—WANT OF NOTICE TO FRIENDS. See GUARDIANSHIP, 1.

NOTICE OF MOTION FOR NEW TRIAL, WITHOUT SPECIFYING GROUNDS, INSUFFICIENT. See NEW TRIAL, 7, 8.

NUISANCE.

LOTTERIES PUBLIC NUISANCES. See LOTTERY, 2.

OFFICES AND OFFICERS.

1. OFFICER "DE FACTO," WHAT. An officer *de facto* is one who has the reputation of being the officer he assumes to be, who has the apparent right and performs the duties of the office under claim and color of right and yet is not a good officer in point of law. *State ex rel. Corey v. Curtis*, 325.

2. OBJECT OF SUSTAINING ACTS OF OFFICER "DE FACTO." The principle of sustaining the acts of an officer *de facto* is designed as a shield for the protection of the public and of third persons, who are not cognizant of the facts nor bound by any rule of law to inquire into the title by which he exercises the office. *State ex rel. Corey v. Curtis*, 325.
3. LIMITATION OF PRINCIPLE SUSTAINING ACTS OF OFFICER "DE FACTO." The principle of sustaining the acts of a person acting as an officer as those of an officer *de facto* ought not to be extended to cases where the rights of the public are not affected nor where all the parties interested have knowledge that the person pretending to be an officer is not an officer *de jure*. *State ex rel. Corey v. Curtis*, 325.
4. OFFICER "DE FACTO" AS DISTINGUISHED FROM USURPER. In order to make a person an officer *de facto* he should in some way have been put into the office and have secured such a holding thereof as to be considered in peaceable possession and actually exercising the functions of an officer; an intrusion by force is not sufficient. *State ex rel. Corey v. Curtis*, 325.

ELECTION OF MINING COMPANY TRUSTEE A CORPORATE ACT. See CORPORATIONS, 3.

PARTIES.

PARTY TO ACTION CANNOT BE CHANGED BY AMENDMENT. See AMENDMENT.

MUTUALITY BETWEEN PARTIES TO CONTRACT. See CONTRACT, 2.

SUING THE WRONG CORPORATION—AMENDMENT NOT ALLOWED. See PLEADING, 7.

PARTNERSHIP.

1. USE BY PARTNERSHIP OF PROPERTY OF ONE PARTNER. In a suit against two of three copartners on notes given by the third in the firm name for the purchase by him of a store-house, where the plaintiff was allowed to show that the store was afterwards used by the copartnership: *Held*, that defendants had the right to show that they allowed their copartner rent for it. *Davis v. Cook*, 134.
2. TAKING NOTE IN NAME OF FIRM FOR INDIVIDUAL DEBT WITH FULL KNOWLEDGE. If one of several partners give a note in the name of the firm for his individual indebtedness, and the payee has full knowledge thereof, the loss or disadvantage resulting to the payee does not constitute a sufficient consideration to maintain an action against the other partners. *Davis v. Cook*, 134.

PAYMENT.

TAX SUIT—EVASIVE ANSWER OF PAYMENT. See PLEADING, 2.

TAXES—RECEIPT FOR LESS AMOUNT NOT EVIDENCE OF PAYMENT IN FULL.
See TAXES, 1.

WAIVER OF TORT BY ACCEPTING MONEY PAID UNDER SUPPOSITION OF WAIVER.
See WAIVER.

PLEADING.

1. "NO VISIBLE PROPERTY" NOT EQUIVALENT TO "NO PROPERTY." An averment that a person "has no visible property exempt from execution" is not equivalent to an averment that he is insolvent or unable to respond in damages. *Connery v. Swift*, 39.
2. TAX SUIT—EVASIVE ANSWER OF PAYMENT. In a suit to recover a certain amount of delinquent taxes, where defendant pleaded that he had paid plaintiff a certain less sum and that plaintiff had accepted and received the same in full satisfaction and discharge: *Held*, that the pleading did not amount to an answer that the taxes had been paid or constitute a defense to the action. *State v. Central Pacific R. R. Co.*, 79.
3. PLEADING OF FACTS IN ACTION TO QUIET TITLE. In a complaint to quiet title it is not correct pleading to merely allege in general terms an adverse claim by defendant, its invalidity and that it is prejudicial to plaintiff, as that is a pleading of conclusions and not of facts; but such a complaint, though defective, is sufficient, in the absence of a demurrer, as an attempt to state a cause of action. *Blasdel v. Williams*, 161.
4. PLEADING A CONCLUSION OF LAW. An averment that certain parties became subscribers to the capital stock of a corporation by signing and delivering an agreement among themselves is not a statement of any fact, but of a mere conclusion of law. *Wheeler v. Floral Mill and M. Co.*, 254.
5. FACT NOT PROPERLY PLEADED NOT PROPERLY FOUND. Where in a suit to foreclose a mechanic's lien in which defendant claimed a set-off, the court found as a fact that the claim was "a proper matter of offset," but there were no proper averments in the answer upon which to base such finding: *Held*, that the fact was not properly found. *Wheeler v. Floral Mill and M. Co.*, 254.

6. CONSTRUCTION OF PLEADING—ALLEGATION OF PLACE OF CORPORATION. An allegation that defendant "is a corporation duly organized and doing business as such in the State of Nevada" is equivalent to an averment that such defendant is a corporation duly organized in the State of Nevada. *Little v. Virginia and G. H. W. Co.*, 317.
7. SUING THE WRONG CORPORATION—AMENDMENT NOT ALLOWED. Where a suit was intended to be commenced against, and the summons was served upon, a California corporation; but the complaint alleged a Nevada corporation; and there happened to be a Nevada corporation of the same name which appeared and answered: *Held*, that plaintiff had no right to amend by adding the words "of the state of California" to the name of defendant, as the effect would be to change the party defendant. *Little v. Virginia and G. H. W. Co.*, 317.
8. ADMISSION BY PLEADING—SETTING UP OF COUNTER CLAIM. Where, in an action for goods sold and delivered, the answer admitted the receipt of the goods; did not deny their value and that no part of it had been paid; but denied all indebtedness and set up a counter claim arising out of the same transaction: *Held*, an admission of the plaintiff's claim as set forth in the complaint, subject to the counter claim. *Skinker v. Clute*, 342.
9. DESCRIPTION OF PROPERTY IN REPLEVIN. In replevin the description of the property must be so clear that an officer can identify it. *Buckley v. Buckley*, 373.

MOTION TO DISSOLVE INJUNCTION ON COMPLAINT AND ANSWER. See INJUNCTION, 2.

INTEREST ON BALANCE OF ACCOUNT — BALANCE ASCERTAINED BY PLEADING. See INTEREST.

POSSESSION.

1. OCCASIONAL ACTS OF OWNERSHIP NOT ACTUAL, BONA FIDE POSSESSION. Where plaintiff's grantor posted notice upon a tract of sixty acres of public land, stating that he claimed it; had it surveyed the next spring; cut hay from it in the summer, and while so doing put up a brush and canvas shanty for occupation, which he afterwards tore down, removing the canvas; and then sold to plaintiff, who in the fall burned the stubble; spent six weeks on the land the next summer; cut the hay; made twenty rods of fencing on one side; built a small cabin; ran three ditches with a plow; then left, and did not return till fall, when he was there again for a few days, burning the stubble; and there was nothing to designate the boundaries of the tract: *Held*, insufficient showing to maintain ejectment. *Kraft v. Carlows*, 20.

2. **FORCIBLE POSSESSION—NO INFERENCE OF HOLDING AS TENANT IN COMMON WITH PERSON OUSTED.** Where a person, who had brought a suit in ejectment for a mining claim, afterwards forcibly ousted defendant and thenceforward held actual and exclusive possession: *Held*, in a subsequent suit by the party ousted, that it was not to be inferred that the party ousting did not hold such possession adversely to the party ousted. *The 420 M. Co. v. Bullion M. Co.*, 240.

3. **OCCUPATION OF TIMBER LAND.** Where, in a suit for trespass in cutting and removing timber, the court charged that by the term occupancy of timber land was meant a subjection of the same to will and dominion and a use of the same for the purpose for which it was located and not a mere residence thereon, and that if plaintiff did not so use and occupy the land the verdict should be for defendant: *Held*, clearly erroneous under the circumstances, as ignoring rights derived from grantors. *Eureka Mining and S. Co. v. Way*, 349.

TRANSFER OF RIGHTS TO USE TIMBER LAND. See **DEED**.

PENDENCY OF EJECTMENT DOES NOT ESTOP PLAINTIFF FROM CLAIMING ADVERSE POSSESSION. See **LIMITATIONS**, 3.

POSSESSION BASE OF ACTION TO QUIET TITLE. See **PRACTICE ACT**.

POSSESSION UNDER CONGRESSIONAL TOWN-SITE ACT. See **TOWN-SITE**.

PRACTICE.

1. **LONG ESTABLISHED RULE OF PRACTICE—STARE DECISIS.** A rule of practice, long established and repeatedly sanctioned, will be adhered to, though it originated in error. *Libby v. Dalton*, 23.

2. **ADMISSION OF VALUE OF GOODS SOLD AND DELIVERED—DRAYAGE ITEMS.** Where, in an action for goods sold and delivered, there was no denial of their receipt and value; and on the trial an open account of them, including charges for drayage, was offered and received in evidence without objection: *Held*, that defendant could not afterwards object to the items for drayage. *Skinner v. Chute*, 342.

REQUIREMENTS OF AFFIDAVIT ON INFORMATION AND BELIEF TO ESTABLISH A FACT. See **AFFIDAVIT**, 1.

PARTY TO ACTION CANNOT BE CHANGED BY AMENDMENT. See **AMENDMENT**.

APPELLANT MUST SHOW INJURY. See **APPEAL**, 2.

- WHAT OBJECTIONS NOT AVAILABLE ON APPEAL IF NOT TAKEN BELOW. See APPEAL, 3.
- CRIMINAL LAW—APPEAL FROM NEW TRIAL ORDER TOO LATE AFTER APPEAL FROM JUDGMENT DISPOSED OF. See APPEAL, 4.
- INSTRUCTION MUST BE APPLICABLE TO CASE. See CHARGE, 7.
- GRANTING OR REFUSING CONTINUANCE MATTER OF DISCRETION. See CONTINUANCE.
- CRIMINAL LAW—DEPARTURE FROM ORDER OF PROOF—DISCRETION. See CRIMINAL LAW, 8.
- CRIMINAL LAW—PRACTICE ON REFUSING INSTRUCTIONS ALREADY GIVEN. See CRIMINAL LAW, 11.
- ARGUMENTS, WHERE CASE SUBMITTED ON OTHER SIDE. See CRIMINAL LAW, 13.
- CRIMINAL LAW—SUPPLYING PROOF OF VENUE AFTER PROSECUTION RESTS. See CRIMINAL LAW, 22.
- REMEDY IN EQUITY TO SET ASIDE VOID JUDGMENT. See EQUITY, 1, 2.
- EXCLUSION OF EVIDENCE AFTERWARDS ADMITTED. See EVIDENCE, 5.
- OBJECTIONS TO EVIDENCE SHOULD STATE POINT OF EXCEPTION. See EVIDENCE, 15.
- NO ERROR IN ADMISSION OF UNPREJUDICIAL TESTIMONY, THOUGH IRRELEVANT. See EVIDENCE, 16.
- FINDINGS, WHEN ATTACKABLE AS AGAINST EVIDENCE. See FINDINGS, 1.
- RIGHT TO TRAVERSE CHALLENGE TO GRAND JUROR AFTER WAIVER OF TRAVERSE. See GRAND JURY, 2.
- INJUNCTION, WHEN TO BE DISSOLVED—DENIAL OF EQUITIES. See INJUNCTION, 1, 2.
- SEPARATION OF JURY WITHOUT OBJECTION. See JURISDICTION, 1.
- MANDAMUS IMPROPER WHERE EJECTMENT AFFORDS FULL REMEDY. See MANDAMUS.
- PRACTICE AS TO NEW TRIALS. See NEW TRIAL, 1-8.

USE BY PARTNERSHIP OF PROPERTY OF ONE PARTNER. See PARTNERSHIP, 1.

SUING THE WRONG CORPORATION—AMENDMENT NOT ALLOWED. See PLEADING, 7.

IN ACTION TO QUIET TITLE PLAINTIFF MUST SHOW ADVERSE CLAIM. See QUIETING TITLE, 2.

NEW TRIAL STATEMENT CANNOT BE CERTIFIED AFTER APPEAL. See STATEMENT, 2.

ASSIGNMENT OF ERRORS MUST SPECIFY PARTICULAR ERRORS. See STATEMENT, 4.

IMPEACHMENT OF VERDICT BY JUROR. See VERDICT, 1.

PRACTICE ACT.

PRACTICE ACT, SEC. 256. The possession of real property is the base upon which an action to quiet title under section 256 of the Practice Act is founded ; but it cannot be said that an admission or proof of the mere fact which gives the right of action, establishes *prima facie* the cause of action. *Blasdel v. Williams*, 161.

SECTION 133—PERISHABLE PROPERTY, WHAT. See ATTACHMENT, 1.

SECTION 131—ORDER ON PROCEEDINGS AGAINST GARNISHEE NOT REVIEWABLE ON CERTIORARI. See ATTACHMENT, 2.

SECTIONS 30 AND 511—JURISDICTION OF JUSTICES. See JURISDICTION, 7.

PRESUMPTIONS.

PRESUMPTION FROM USE OF DEADLY WEAPON. When a person uses a deadly weapon upon the person of another in a manner likely to produce death, the law presumes an intent to commit murder—as distinguished from what he may have actually accomplished—unless facts are shown sufficient to excuse, mitigate, or justify the act. *Slate v. Keith*, 15.

CRIMINAL APPEALS — PRESUMPTIONS IN FAVOR OF INSTRUCTION. See CHARGE, 1.

CHARGING DIFFERENT WAYS — PRESUMPTIONS. See CHARGE, 2.

BY-LAWS OF MINING COMPANY, ADOPTION BY LONG USE. See CORPORATIONS, 2.

CRIMINAL LAW—DEPARTURE FROM ORDER OF PROOF—DISCRETION. See CRIMINAL LAW, 8.

FIRE ALONG LINE OF RAILROAD—PRESUMPTIONS. See EVIDENCE, 9.

REFUSAL TO APPOINT GUARDIAN—PRESUMPTION IN ABSENCE OF EVIDENCE. See GUARDIANSHIP, 2.

WEIGHT OF EVIDENCE ON MOTION FOR NEW TRIAL AND ON APPEAL. See NEW TRIAL, 4.

FORCIBLE POSSESSION—NO INFERENCE OF HOLDING AS TENANT IN COMMON WITH PERSON OUSTED. See POSSESSION, 2.

PRESUMPTION WHEN NEW TRIAL STATEMENT DOES NOT SHOW ALL THE EVIDENCE. See STATEMENT, 1.

QUIETING TITLE.

1. ACTION TO QUIET TITLE—PRIMA FACIE CASE FOR PLAINTIFF—BURDEN OF PROOF. In an action to quiet title under section 256 of the Practice Act, where the allegations of the complaint, except that of adverse claim, are denied, mere proof of possession or title with possession does not make out a *prima facie* case or throw the burden of proof on defendant to produce his claim; and a judgment for plaintiff in such case, with no evidence of the fact of an adverse claim by defendant, is erroneous. *Blasdel v. Williams*, 161.

2. IN ACTION TO QUIET TITLE PLAINTIFF MUST SHOW ADVERSE CLAIM. In an action to quiet title the plaintiff is as in other cases the actor; and, as the cause of action is the assertion by defendant of a claim to his prejudice, it devolves upon him to show such assertion of claim and that it is prejudicial to him, before the defendant can be called upon to move. *Blasdel v. Williams*, 161.

PLEADING OF FACTS IN ACTION TO QUIET TITLE. See PLEADING, 3.

RAILROADS.

1. FIRES CAUSED BY LOCOMOTIVES—RELEVANCY OF EVIDENCE OF PREVIOUS FIRES. In a suit against a railroad company for damages occasioned by setting fire to cord-wood by one of its locomotives: *Held*, that testimony of previous fires in the same place caused by coals dropped from defendant's locomotives, and also of the emission at the same place of sparks of sufficient size to set fire to cord-wood, was admissible. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
2. RAILROAD BOUND TO USE BEST KNOWN APPLIANCES TO PREVENT INJURY. A railroad company is obliged to employ the best known appliances to prevent injury to others from fire; and the failure to do so is want of ordinary care and prudence. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
3. LIMIT TO RIGHT OF RAILROAD TO EMIT SPARKS. A railroad company has authority to run a locomotive propelled by steam and as a necessary consequence to emit sparks of fire; but it has no right to carelessly emit sparks in such a manner as to set fire to property along the line of its road. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
4. RAILROAD SPARK-CATCHERS—HOW FAR NEW APPLIANCES NECESSARY. Though a railroad company must use the best appliances to prevent the scattering of fire, such appliances are not required to the extent of materially impairing the reasonable use of a locomotive engine. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.
5. RAILROAD TO KEEP ITS TRACK CLEAR AND PREVENT ESCAPE OF FIRE. A railroad company must be diligent in keeping its track clear of such combustible matter as is liable to be easily ignited, and especially diligent to prevent the escape of fire when in the immediate neighborhood of combustible property. *Longabaugh v. Virginia City and T. R. R. Co.*, 271.

FIRE ALONG LINE OF RAILROAD—PRESUMPTIONS—BURDEN OF PROOF. See EVIDENCE, 9, 10.

QUESTION OF NEGLIGENCE BY RAILROAD. See NEGLIGENCE, 1, 2, 3, 5.

RECEIPT.

TAXES—RECEIPT FOR LESS AMOUNT NOT EVIDENCE OF PAYMENT IN FULL. See TAXES, 1.

RECOGNIZANCE.

1. **RECOGNIZANCE—"BRIEFLY STATING NATURE OF OFFENSE."** A recognizance which gives the name of the offense for which the principal is held, sufficiently complies with the statutory provision (Crim. Pr. Act, Sec. 405,) of "briefly stating the nature of the offense." *State v. Birchim*, 95.
2. **RECOGNIZANCES NOT IN STATUTORY FORM.** It seems that a failure to follow the statutory form in giving a recognizance would not, if the obligation were in other respects plain, release the obligors from their liability. *State v. Birchim*, 95.

RECOGNIZANCES AND COMMITMENTS, RULES OF CONSTRUCTION DIFFERENT. See **CONSTRUCTION**, 1.

RENTS AND PROFITS.

IMPROVEMENTS IN GOOD FAITH AS SET-OFF TO RENTS AND PROFITS. See **SET-OFF**.

REPLEVIN.

1. **REPLEVIN OF GOODS IN HANDS OF PLAINTIFF IN OTHER REPLEVIN.** Where personal property in the hands of the plaintiff in a suit of claim and delivery is claimed by a third person, the latter is not obliged to intervene in the pending action, but may institute an original action of claim and delivery. *Buckley v. Buckley*, 373.
2. **WHEN REPLEVIN LIES.** As a general principle the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it is in the custody of the law, or unless it has been taken by replevin from him by the party in possession. *Buckley v. Buckley*, 373.

EXTENT OF RECOVERY IN REPLEVIN. See **CHARGE**, 8.

MEASURE OF DAMAGES IN REPLEVIN. See **DAMAGES**, 2.

DESCRIPTION OF PROPERTY IN REPLEVIN. See **PLEADING**, 9.

ROADS.

1. **ROAD TAX OF 1873 UNCONSTITUTIONAL.** The highway act of 1873, in so far as it provides for a road tax upon individuals, (Comp. Laws, 3927) is obnoxious to the constitutional provision relating to poll-taxes, (Const. Art II, Sec. 7) and is void. *Hassett v. Walls*, 387.

2. ROAD SERVICE A TAX. The levy of service upon an individual for road purposes is an emanation from the taxing power. *Hassett v. Walls*, 387.

ROAD TAX OF 1873 A POLL TAX. See TAXES, 5.

SENTENCE.

CRIMINAL LAW—UNCERTAINTY IN SENTENCE. See CRIMINAL LAW, 2.

FIXING TIME OF EXECUTION NOT PART OF JUDGMENT IN CAPITAL CASE. See CRIMINAL LAW, 17.

VOID JUDGMENT VOID AB INITIO. See JUDGMENT, 1.

SERVICE.

AFFIDAVIT FOR PUBLICATION OF SUMMONS. See AFFIDAVIT, 2.

JURISDICTION OF JUSTICES—PRACTICE ACT, SECTIONS 511 AND 30. See JURISDICTION, 7.

JURISDICTION OF JUSTICE OVER NON-RESIDENTS. See JUSTICE OF THE PEACE, 3.

SET-OFF.

IMPROVEMENTS IN GOOD FAITH AS SET-OFF TO RENTS AND PROFITS. If beneficial improvements are made by a person in good faith under the belief of absolute ownership, their value will be allowed him, on an accounting between him and the true owner for rents and profits. *Cookes v. Culbertson*, 199.

SET-OFF NOT PROPERLY PLEADED NOT PROPERLY FOUND. See PLEADING, 5.

ADMISSION BY PLEADING—SETTING UP OF COUNTER CLAIM. See PLEADING, 8.

SHERIFF.

SHERIFF MUST PRESERVE ATTACHED PROPERTY.—When a sheriff attaches personal property he is not allowed, under the statute, to consider the element of expense in its preservation or keeping, but is bound to have it ready to be disposed of according to the judgment, unless compelled to sell on account of its being perishable; and it is no excuse for a failure to have it so ready that the best interests of the parties were subserved by a sale. *Newman v. Kane*, 234.

WRONGFUL SALE OF PROPERTY ATTACHED—TIME OF CONVERSION—MEASURE OF DAMAGES. See CONVERSION.

STATEMENT.

1. NEW TRIAL STATEMENT SHOULD AFFIRMATIVELY SHOW ALL THE EVIDENCE. Where the statement on motion for new trial does not affirmatively appear to contain all the evidence, the existence of other evidence will be assumed. *Libby v. Dalton*, 23.
2. NEW TRIAL STATEMENT CANNOT BE CERTIFIED AFTER APPEAL. After a motion for a new trial on a statement, which is neither agreed to, allowed or certified, has been decided and an appeal taken, the court below has no authority to add a certificate; and a motion in the Supreme Court for leave to add such certificate will be denied. *Lamburth v. Dalton*, 64.
3. NEW TRIAL STATEMENT FOR INSUFFICIENCY OF EVIDENCE SHOULD SHOW ALL THE EVIDENCE. On appeal from an order overruling a motion for new trial, based upon alleged insufficiency of the evidence to justify the verdict, the statement will not be considered unless it affirmatively shows that it contains all the material evidence produced at the trial. *Sherman v. Shaw*, 148.
4. ASSIGNMENT OF ERRORS MUST SPECIFY PARTICULAR ERRORS. An assignment of "errors of the court in admitting the testimony excepted to by the defendant," as contained in the statement, is entirely too general. *Sherman v. Shaw*, 148.

OBJECTIONS TO RULINGS AT TRIAL TO BE ASSIGNED AS ERRORS. See APPEAL, 1.

NEW TRIAL FOR INSUFFICIENCY GRANTED ON DEFECTIVE STATEMENT, WILL BE REVERSED. See NEW TRIAL, 2.

PRACTICE IN CASES OF CONTEST FOR PUBLIC LAND. See NEW TRIAL, 3.

DEFECTIVE NOTICE FOR NEW TRIAL NOT HELPED OUT BY STATEMENT. See NEW TRIAL, 8.

STATUTES.

1. LAWS "REGULATING COUNTY BUSINESS." A statute prescribing the manner in which the payment of the indebtedness of a county shall be conducted is a law regulating county business. *Youngs v. Hall*, 212.

2. **SPECIAL STATUTES AS OPPOSED TO PUBLIC OR GENERAL.** The words "public or general" on the one hand, and "private or special" on the other, as applied to statutes, are convertible terms; so that the word "special" when used is as much the antithesis of "public" as it is of "general." *Youngs v. Hall*, 212.
3. **A GENERAL STATUTE NEED NOT BE APPLICABLE TO ALL COUNTIES.** A statute, to be general, must be operative alike upon all persons similarly situated; but it need not be applicable to all the counties in the state. *Youngs v. Hall*, 212.
4. **ESMERALDA COUNTY REDEMPTION-FUND ACTS GENERAL STATUTES.** The statutes providing for a redemption fund in Esmeralda County (Stats. 1867, 76; 1869, 58) are applicable to all persons sustaining the relation of creditors to Esmeralda County, and are therefore general as contradistinguished from special laws. *Youngs v. Hall*, 212.
5. **DISTINCTION BETWEEN LOCAL AND SPECIAL STATUTES.** A statute may be special and not local, or it may be local and not special. *Youngs v. Hall*, 212.
6. **LOCAL STATUTE, WHAT.** A local law is one relating, belonging or confined to a particular place as distinguished from general, personal or transitory. *Youngs v. Hall*, 212.
7. **ESMERALDA COUNTY REDEMPTION-FUND ACTS NOT LOCAL STATUTES.** The statutes providing for a redemption fund in Esmeralda County (Stats. 1867, 76; 1869, 58) as they embrace all persons holding a certain species of property irrespective of locality, and operate as to such property as well without as within Esmeralda County, are not local laws. *Youngs v. Hall*, 212.
8. **STATUTES CHANGING APPLICATION OF INCOMING REVENUE DO NOT IMPAIR OBLIGATION OF CONTRACTS.** Where there were a number of warrants outstanding against a county and payable out of its "general fund," and certain new statutes were passed providing that the revenues to be collected, which would otherwise have gone into such fund, should constitute a "redemption fund" for the payment of such warrants as should be offered at the lowest price: *Held*, that, as the holders of such outstanding warrants never had any security for payment except the good faith of the State, and as the legislature had entire control over revenues to be raised, the statutes in question did not impair the obligation of any contract. *Youngs v. Hall*, 212.
9. **STATUTE MAY EMBRACE MATTERS GERMAIN TO SUBJECT.** The details of a statute need not be specifically stated in the title; but matters germane to the subject and adapted to the accomplishment of the object in view may properly be included. *State v. Silver*, 227.

10. WHEN STATUTE VOID IN PART AND VALID IN PART. The principle that an act may be void in part and valid in part applies only when the respective portions are wholly independent of each other. *State ex rel. Corey v. Curtis*, 325.

CERTIORARI AS TO PROCEEDINGS UNDER TOWN GOVERNMENT ACT. See CERTIORARI.

CRIMES ACT, SEC. 26, AS AN INSTRUCTION. See CHARGE, 3.

EMERALDA COUNTY REDEMPTION-FUND ACTS NOT UNCONSTITUTIONAL. See CONSTITUTION, 1.

STATUTE TO EMBRACE BUT ONE SUBJECT. See CONSTITUTION, 2.

CRIMINAL PRACTICE ACT, SECS. 166, 504. See CONSTRUCTION, 1.

CONSTRUCTION OF STATUTES "IN PARI MATERIA." See CONSTRUCTION, 2.

CRIMINAL PRACTICE ACT, SEC. 29. See CRIMINAL LAW, 9.

CRIMES ACT, SEC. 143. See CRIMINAL LAW, 16.

COMPILED LAWS, 2206. See CRIMINAL LAW, 21.

CRIMES ACT, SEC. 64. See INDICTMENT, 2.

GIFT CONCERT ACT OF 1871. See JURISDICTION, 1.

CONSTRUCTION OF STATUTES EXCLUSIVELY A JUDICIAL POWER. See JURISDICTION, 1.

ACTS FOR REMOVAL OF SUITS TO FEDERAL COURTS. See JURISDICTION, 2, 3, 4.

ACT ESTABLISHING BOUNDS AND EXEMPTING JURORS NOT UNCONSTITUTIONAL. See JURY, 2.

STATUTE OF LIMITATIONS AS TO MINING CLAIMS. See LIMITATIONS, 2.

GIFT CONCERT ACT. See LOTTERY, 1, 2, 3.

PROVISION RELATING TO KILLING OF STOCK IN MARKS AND BRANDS STATUTE UNCONSTITUTIONAL. See MARKS AND BRANDS.

ACTS OF CONGRESS RELATING TO MINING CLAIMS. See MINES.

ACTS IN RELATION TO CONTEST FOR PUBLIC LAND. See NEW TRIAL, 3.

PRACTICE ACT. See PRACTICE ACT.

CRIMINAL PRACTICE ACT, SEC. 405. See RECOGNIZANCE, 1.

COMPILED LAWS, 3927—ROAD TAX. See ROADS, 1.

"LORD'S DAY" ACT OF 1861. See SUNDAY LAW.

GAMING ACT OF 1869. See SUNDAY LAW.

TOWN GOVERNMENT ACT OF 1873. See TOWNS, 1, 2, 3.

CONGRESSIONAL TOWN-SITE ACT. See TOWN-SITE.

STOCK.

STOCK IN CALIFORNIA MINING COMPANY, NOT NEGOTIABLE. Under the laws of California the legal title to mining stock, except as between the parties, can be acquired only by transfer upon the books of the corporation. *Bercich v. Marye*, 312.

LIABILITY OF BROKER TO TRUE OWNER FOR STOLEN STOCK SOLD. See BROKER.

DAMAGES FOR CONVERSION OF STOCK. See DAMAGES, 1.

MEASURE OF DAMAGES FOR CONVERSION OF STOCK. See DAMAGES, 2.

SUMMONS.

AFFIDAVIT FOR PUBLICATION OF SUMMONS. See AFFIDAVIT, 2.

SUNDAY LAW.

VIOLATION OF "LORD'S DAY" ACT OF 1861 — QUESTION ON HABEAS CORPUS. Where a person held in custody under a commitment by a justice of the peace for violation of the act of November 21, 1861, by gaming on Sunday (Stats. 1861, 39,) sued out a habeas corpus and claimed his discharge on the ground that the act of 1861 was virtually repealed by the act of 1869 to restrict gaming (Stats. 1869, 119): *Held*, that the justice had jurisdiction to determine the question raised; that his judgment, though it might be erroneous, was not void, and that such judgment could not be reviewed on habeas corpus. *Ex Parte Winston*, 71.

SURETY.

RECOGNIZANCE—"BRIEFLY STATING NATURE OF OFFENSE." See RECOGNIZANCE, 1.

RECOGNIZANCES NOT IN STATUTORY FORM. See RECOGNIZANCE, 2.

TAXES.

1. TAXES—RECEIPT FOR LESS AMOUNT NOT EVIDENCE OF PAYMENT IN FULL. Where a corporation owing a certain amount of taxes for three years entered into a compromise with the board of county commissioners, whereby it paid a certain less amount and received a receipt purporting to be in full for all the taxes: *Held*, that such receipt was not evidence of payment in full for the tax of any one year. *State v. Central Pacific R. R. Co.*, 79.
2. POWER TO REDUCE TAXES. The only authority giving county commissioners power to reduce or in any manner change taxes as assessed is vested in them as boards of equalization; and when acting in that capacity they must comply literally with the plain provisions of the statute. *State v. Central Pacific R. R. Co.*, 79.

3. COUNTY COMMISSIONERS CANNOT RELEASE LIEN OF TAXES. When taxes are levied they become a lien, and when the board of equalization has acted an obligation immediately arises on the part of the party taxed to pay the State the amount due; and thereafter county commissioners can neither release the property from the lien nor discharge the party from his obligation. *State v. Central Pacific R. R. Co.*, 79.
4. LEGISLATIVE CONTROL OVER REVENUES TO BE RAISED. Though the legislature cannot deprive a creditor of funds raised for the payment of his demands and to which he has a vested right, it can designate purposes, other than the payment of such creditors, to which the revenue thereafter to be raised shall be applied. *Youngs v. Hall*, 212.
5. ROAD TAX OF 1873 A POLL-TAX. The road tax of four dollars annually, or two days' labor, imposed upon individuals by the Highway Act of 1873 (Comp. Laws, 3927) whether regarded as a levy in money or service, is a capitation or poll-tax. *Hasselt v. Walls*, 387.
- ONLY ONE CONSTITUTIONAL POLL-TAX. See CONSTITUTION, 3.
- COUNTY COMMISSIONERS CANNOT COMPROMISE TAX SUITS. See COUNTY COMMISSIONERS, 1.
- TAX SUIT—EVASIVE ANSWER OF PAYMENT. See PLEADING, 2.
- ROAD TAX OF 1873 UNCONSTITUTIONAL. See ROADS, 1.

THREATS.

MURDER—WHEN "THREATS" AVAILABLE IN DEFENSE. See CRIMINAL LAW 5, 6.

TIMBER.

POSSESSION OF TIMBER LAND—RIGHTS ACQUIRED FROM PREDECESSORS. In a suit for trespass in cutting and removing timber, the court charged that a mere survey and marking of boundaries of public land was insufficient to entitle plaintiff to recover, but that he must have been in the actual occupation of the same, using it for the purpose for which it was adapted: *Held*, clearly erroneous under the circumstances, as ignoring any rights of use or occupation derived from grantors. *Eureka Mining and S. Co. v. Way*, 349.

TRANSFER OF RIGHTS TO USE TIMBER LAND. See DEED.

TOWNS.

1. TOWN GOVERNMENT ACT OF 1873—AFFIDAVIT BY "TAX-PAYER OF COUNTY" INSUFFICIENT. Under the act of February 21, 1873, providing for the government of a town or city in case of the filing of a certain affidavit by a resident and tax-payer of such town or city (Stats. 1873, 74, Sec. 16): *Held*, that an affidavit stating affiant to be "a resident and tax-payer in the county" was insufficient. *Morgan v. Eureka County Commissioners*, 360.

2. TOWN GOVERNMENT ACT—AFFIDAVIT AS TO "GENUINENESS OF SIGNATURES." Where the town government act of February 21, 1873 (Stats. 1873, 74, Sec. 16), required the genuineness of all signatures to the petition therein provided for, and the qualifications of the subscribers thereto as the majority of the actual residents representing three-fifths of the taxable property of the town, to be established by affidavit: *Held*, that an affidavit stating that affiant "had examined the signatures," and that "the same represents three-fifths of the taxable property as well as a majority of the actual residents of said town to the best of his knowledge and belief," was insufficient and entirely ineffective. *Morgan v. Eureka County Commissioners*, 360.
 3. TOWN GOVERNMENT ACT—SUFFICIENT PETITION AND AFFIDAVIT JURISDICTIONAL FACTS. Under the town government act of February 21, 1873 (Stats. 1873, 74, Sec. 16), requiring a certain petition and affidavit to be filed before any of the powers conferred could be exercised: *Held*, that the filing of a sufficient petition and affidavit were jurisdictional facts; and that, in case of insufficiency of such petition or affidavit, there was not a mere irregularity but a total want of jurisdiction. *Morgan v. Eureka County Commissioners*, 360.
- "BENEFICIAL INTEREST" TO SUSTAIN CERTIORARI AS TO PROCEEDINGS UNDER TOWN GOVERNMENT ACT. See CERTIORARI.

TOWN-SITE.

DEED OF TRUSTEE UNDER CONGRESSIONAL TOWN-SITE ACT NOT CONCLUSIVE. A deed given by a trustee under the congressional town-site act (5 U. S. Stats. 567) is not conclusive; if the grantee was not in occupancy or entitled to occupancy of the land the trustee could have no authority to execute such deed, and it may be collaterally attacked as void and of no effect. *Treadway v. Wilder*, 67.

TRANSFER.

REMOVAL OF SUITS TO FEDERAL COURT. See JURISDICTION, 2, 3, 4, 5.

UNITED STATES.

REMOVAL OF SUITS TO FEDERAL COURT. See JURISDICTION, 2, 3, 4, 5.

ACTS OF CONGRESS RELATING TO MINING CLAIMS. See MINES.

VENUE.

CRIMINAL LAW—SUPPLYING PROOF OF VENUE AFTER PROSECUTION RESTS. See CRIMINAL LAW, 22.

VERDICT.

1. IMPEACHMENT OF VERDICT BY JUROR. No juror should ever be allowed to impeach the verdict of a jury by testifying to his own misconduct or by asserting his ignorance of the law. *State v. Stewart*, 120.

2. RECOMMENDATION TO MERCY NO PART OF VERDICT. A recommendation to mercy by a jury, in a criminal case, is no part of their verdict, and should not be recorded with it. *State v. Stewart*, 120.

3. INTOXICATION OF JUROR AVOIDS VERDICT. Though the moderate use of liquor by a jury, unless furnished by the prevailing party, does not constitute such misconduct as will vitiate their verdict; yet, if it appear that any one of the jurors while sitting as such used liquor to an intoxicating extent, the verdict will be set aside. *Davis v. Cook*, 134.

IMPERFECT INDICTMENT CURED BY VERDICT. See INDICTMENT, 1.

SEPARATION OF JURY WITHOUT OBJECTION. See JURY, 1.



WAIVER.

WAIVER OF TORT BY ACCEPTING MONEY PAID UNDER SUPPOSITION OF WAIVER. Where a clerk had unlawfully converted the property of his employer and received the proceeds, and afterwards, upon being called to account by his employer, gave up all of the proceeds which he still had and other property of his own, which was accepted by the employer; and there was nothing said or done to disabuse the clerk of his supposition that the property was accepted in settlement: *Held*, that the effect of such acceptance was a waiver on the part of the employer of the tort of the clerk. *Marye v. Martin*, 28.

RIGHT TO TRAVERSE CHALLENGE TO GRAND JUROR AFTER WAIVER OF TRAVERSE. See GRAND JURY, 2.

WITNESS.

1. IMPEACHMENT OF WITNESS—GENERAL MORAL CHARACTER NOT IN ISSUE. Upon impeachment of a witness, it is his general reputation for truth and veracity, and not his general moral character, which is in issue. *State v. Ferguson*, 106.

2. EXTENT OF CROSS-EXAMINATION OF ACCUSED. Where a defendant in a criminal case offers himself as a witness on his own behalf, he is to be held and treated so far as an ordinary witness for the defense that he can be cross-examined, and in the discretion of the court recalled for further cross-examination. *State v. Cohn*, 179.

PROSECUTION CANNOT MAKE ACCUSED ITS OWN WITNESS. See CRIMINAL LAW, 14.

EFFECT TO BE GIVEN DEFENDANT'S OWN TESTIMONY. See EVIDENCE, 3.

